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VERMONT REPORTS
May 15
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF THE
STATE OF VERMONT

BY

JOHN W. REDMOND

○

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF VERMONT.

F. R. PATCH MANUFACTURING CO. v. JOHN E. CAPELESS
ET AL.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed May 11, 1906.

Partnership—Unincorporated Associations—Liability of Members—Conclusiveness of Judgment against Association—Action against Members under V. S. 1183—Trustee Process—Constitutional Law—Due Process of Law.

Partnership debts are the debts of each partner *in solido*; and, at common law, both separate and joint creditors may attach either separate or joint property and sell it on execution in satisfaction of their judgments, regardless of the equities existing between their debtors.

In equity, partnership property must be used to pay partnership liabilities in preference to debts due creditors of the individual partners; but, to the extent that partnership liabilities are not fully paid by the joint property, they stand the same as other debts against each partner's separate estate.

At common law, an unincorporated association, as regards its rights and liabilities, is fundamentally a large partnership, the status of

its members is that of partners, and the association must sue and be sued in the names of its members, however numerous they may be.

- V. S. 1099 provides that certain unincorporated associations may be sued in their associate name, and that service of process against them, made upon either of certain officers, shall have the same effect as if made upon all the associates; and V. S. 1183 provides that, if execution on a judgment thus obtained against any such association is returned unsatisfied, a suit for the amount unpaid may be brought against any or all of the associates "upon their original liability." *Held*, that an action under V. S. 1183 is statutory, and not based upon the same cause of action as that upon which the judgment was obtained; and that the words "original liability," as used in that section, have reference to the liability consequent on membership in the association at the time of the creation of the liability upon which the judgment was recovered.
- A judgment obtained against an unincorporated association under V. S. 1099, is conclusive against all persons who were members thereof when the liability merged in the judgment was created; but persons whose membership had then ceased or did not begin till subsequent thereto, are not liable in supplemental proceedings under V. S. 1183.
- V. S. 1099, providing for a judgment binding all the members of certain unincorporated associations after service on an officer, is not in violation of the fourteenth amendment to the federal Constitution as taking property without due process of law.
- The statutory liability of the members of the unincorporated associations contemplated by V. S. 1099, is contractual in nature. In becoming members, they impliedly agree with each other and with all persons who may hold legal claims against the association, to be bound by the provisions of the statute.
- An action under V. S. 1183 against the members of an unincorporated association, being founded on an implied contract, is properly brought by trustee process.

ASSUMPSIT on V. S. 1183. Heard at the September Term, 1905, Rutland County, *Watson J.*, presiding, on defendant William Haverly's motion to dismiss for that the cause of action is not founded on a contract express or implied, but on a tort; on defendant S. L. Huffmere's demurrer to the

declaration; and on motion by the Delaware and Hudson Company, a trustee, to quash the return of service upon it. The motion to dismiss was overruled, *pro forma*, to which defendant Haverly excepted. The demurrer was overruled *pro forma*, and the declaration adjudged sufficient, to which the demurrant excepted. The motion to quash was overruled *pro forma*, to which the Delaware and Hudson Company excepted, but waived its exception in the Supreme Court. The opinion fully states the case. See 77 Vt. 294.

Butler & Moloney for the defendants.

To hold that the defendants are bound by the judgment in the original suit, wherein no service of process was made upon them, would be to take their property without due process of law in violation of the fourteenth amendment of the federal Constitution. *Gilman v. Tucker*, 128 N. Y. 100; *Landon v. Townsend*, 112 N. Y. 97; *Winslow v. Clark*, 47 N. Y. 261; *Freeman*, Judgments, § 154; *Hubbard v. Dubois*, 37 Vt. 96; *Simon v. Craft*, 182 U. S. 427; *Iowa Cent. R. Co. v. Iowa*, 160 U. S. 389; *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230; *Pennoyer v. Neff*, 94 U. S. 714; *Webster v. Reid*, 11 How. 437; *Kilburn v. Woodworth*, 5 Johns. 37; *Fisher v. Lane*, 3 Wils. 297; *Borden v. Fitch*, 15 Johns. 121; *D'Arcy v. Ketcham*, 11 How. 165; *Ins. Co. v. French*, 18 How. 404; *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 577; *Zeigler v. R. R. Co.*, 58 Ala. 594; *State v. Billings*, 55 Minn. 467; *Barwell v. Collins*, 44 Minn. 97; *Stuart v. Palmer*, 74 N. Y. 191; *Weimer v. Bunbury*, 30 Mich. 201; *Philadelphia v. Miller*, 49 Pa. St. 440; *Ireland v. Rochester*, 51 Barb. 414; *Howes v. Bassett*, 56 Vt. 142; *Ex parte Langdon*, 25 Vt. 680; *Bartlett v. Wilson*, 59 Vt. 33; *Barnes v. Dyer*, 56 Vt. 469; *Eliot v. McCormick*, 144 Mass. 12.

The declaration counts upon a cause of action sounding in tort, and the action should be dismissed because commenced by trustee process. *Ferris v. Ferris*, 25 Vt. 100.

Marvelle C. Webber, and *Orion M. Barber* for the plaintiff.

It has been expressly held that a partnership is not a legal entity, and that an association is a partnership. *Faulkner v. Hyman*, 142 Mass. 53; *Ricker v. Am. Loan etc. Co.*, 140 Mass. 346; 39 Am. L. Rev., 533; 1 Kinkead, Torts, § 54.

The declaration does not count upon a tort. The action is assumpsit upon the promise implied by the statute. *Wheeler v. Wilson*, 57 Vt. 157; *Danville v. Putney*, 6 Vt. 512; *Rann v. Green*, 2 Cowp. 474; *Wright v. McKee*, 37 Vt. 165.

The defendants have had their day in court. They, and no one else, were the defendants in the original suit, because the association is a partnership and a partnership is not a legal entity. Who, then, if not the defendants, appeared and defended the original suit?

The *form* of the action determines whether it may be commenced by trustee process. This action is assumpsit, and hence properly begun by trustee process. *Elwell v. Martin*, 32 Vt. 217; *Fisher v. Jail Com.*, 3 Vt. 330; *Gutta Percha & Rubber Co. v. Mayor, etc.*, 108 N. Y. 276; 1 Freeman, Judgts., § 4; Black, Judgt., § 11; *Rockwell v. Butler*, 17 L. R. A. 611; *Sawyer v. Vilas*, 19 Vt. 44.

WATSON J. This action is here on demurrer to the declaration.

The declaration shows that on or about the 15th day of November, 1902, the plaintiff brought its action in Rutland County Court against Protection Lodge, No. 215, Interna-

tional Association of Machinists, in its associate name, by serving process on its president as authorized by section 1099 of Vermont Statutes, Protection Lodge, No. 215, being an unincorporated association consisting of five and more persons, having a president, clerk and treasurer; that a trial was had in said action at the March term, 1903, of that court, and a verdict for damages recovered in favor of the plaintiff and against said Protection Lodge and judgment had thereon, which judgment was thereafter affirmed in the Supreme Court; that execution was issued on the judgment against the property of Protection Lodge, No. 215, and thereafter the same was returned wholly unsatisfied, and so remains; and that the defendants in the present action were associates and members of said Protection Lodge, No. 215, at the time of the commission of the grievances for which the damages were recovered, and at the time the trial was had, verdict recovered, and judgment obtained as above stated.

Section 1099 of Vermont Statutes, under the provisions of which Protection Lodge, No. 215, was thus sued in its associate name and service of process made upon its president, reads as follows: "A partnership, or an unincorporated association or joint stock company, consisting of five or more persons having a president, other principal officer, clerk or treasurer may sue and be sued in its firm, associate, or company name, and service of process against such partnership, association or company, made upon either of such officers shall have the same force and effect as regards the joint rights, property and effects of the partnership, association, or company as if served upon all the partners, associates, or shareholders."

The present suit, which may be regarded as supplementary, is brought against alleged associates and members of Protec-

tion Lodge, No. 215, for the amount unpaid on that judgment, upon section 1183 of Vermont Statutes which reads: "If execution on a judgment obtained against a partnership, association, or company in its firm, associate, or company name, is returned unsatisfied in whole or in part, a suit for the amount unpaid may be brought against any or all of the partners, associates, or shareholders upon their original liability, provided that only one such suit shall be brought and maintained at the same time, and if the execution issued in the last named suit is returned unsatisfied in whole or in part, subsequent actions may in like manner be maintained for the amount unpaid."

At common law an unincorporated association, as regards its rights and liabilities, is fundamentally a large partnership. The relation of the members composing it is to each other and to the outside world, that of partners. *Walker v. Wait and Others*, 50 Vt. 668; *Burnes v. Pennell*, 2 H. L. Cas. 497. Partnership debts are the debts of each partner *in solido*,—3 Kent's Com. 32; *Cutler v. Estate of Thomas*, 25 Vt. 73,—and at law both separate and joint creditors may attach either separate or joint property and sell it on execution in satisfaction of their judgments without regard to equities existing between their debtors. But in equity partnership effects must be applied in satisfaction of partnership debts and liabilities in preference to debts due creditors of the individual partners; and to the extent that partnership debts and liabilities are not fully paid by the joint property, they stand the same as other debts against each partner's separate estate. *Bardwell v. Perry*, 19 Vt. 292; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Barton National Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

It is also a well established rule that a firm or unincorporated company must sue and be sued in the names of its

individual members, however numerous they may be. Dicey on Parties, 147, 266. Yet as we have seen, by section 1099 of Vermont Statutes any partnership, unincorporated association, or joint stock company falling within its provisions, may sue and be sued in its firm, associate, or company name, and that service of process made upon either of its officers named in that section shall have the same force and effect as regards the joint rights, property, and effects of the partnership, association, or company as if served on all the members.

That section of the statute and the section upon which this action is brought, in their original form, were parts of the same Act, No. 71, Laws of 1882, and must be construed together.

Such partnerships, associations, and joint stock companies may be and often are not only composed of many different members, residents of different states and countries, but constantly changing by some dropping out and others coming in. Manifestly this statute was enacted for the practical convenience and benefit of the partnerships, associations, and companies to which it relates, as well as for the convenience and benefit of creditors, in bringing and prosecuting suits. In operation it inures also to the more substantial benefit of the individual partners, associates, and shareholders. We do not consider whether or not the procedure therein provided is exclusive. But surely when the statute is invoked to enforce liabilities against partnerships, associations, or companies, the members have the benefit of equity principles in that the joint property must first be taken to satisfy judgments, and it is only for the amount unpaid when executions against such property are returned wholly or in part unsatisfied that suits can be brought against the individual members and their separate property taken. In the first instance the obligation of each

partner to the others and to creditors is in nature contractual at common law. By section 1183, partners, associates, and shareholders are made individually liable to execution creditors for the amount of a judgment unpaid after an execution against the joint property has been returned unsatisfied in whole or in part, with the further limitation that only one suit against members shall be brought and maintained at the same time, and if the execution in the last suit is not returned fully satisfied subsequent actions can be had in like manner for so much as remains unpaid. Here the liability of the individual members in its modified form is contractual in nature by operation of the statute. In legal effect each member when he becomes such thereby obligates himself to the other members and to all persons who may hold liabilities against the firm, association, or company of which he becomes a member, for the payment of the amount unpaid on judgments against it after the joint property has been taken in execution and applied thereon, and this obligation is in law as much a part of every contract and liability against the partnership, association, or company as it would be if it had been directly entered into by the members in connection therewith. The statutory liability here imposed is analogous to the statutory liability of individual stockholders for the debts of a corporation. In cases involving the latter it is held that the stockholders by availing themselves of the benefits to be derived from the corporate organization impliedly agree to be responsible for the debts of the corporation; that creditors contract with reference to it; that it becomes a part of the law of their contracts; and that when a person becomes a stockholder this liability rests upon him as an incident to his stock. *Barton National Bank v. Atkins*, before cited; *King v. Cochran*, 76 Vt. 141, 56 Atl. 667; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587.

It is strenuously urged, however, that the action under the provisions of section 1183 must be based upon the "original liability," and that this action is not of that character. The statute provides that "a suit for the amount unpaid may be brought against any or all of the partners, associates, or shareholders upon their original liability." It is evident from the section as a whole that the remedy there given is statutory, consequently that the actions must be based upon the statute, and brought to recover the amount unpaid on the judgment, rather than for the sum due or for damages on the liability merged in the judgment. The amount to be recovered is fixed by the judgment, which is inconsistent with the idea that the supplemental suit against a member must be upon the same cause of action as that upon which the judgment was obtained. And such inconsistency is the more noticeable when we consider that the judgment may have been recovered in an action *ex delicto*, where the damages were unliquidated. We think the words "original liability," as used in that section, have reference to the liability consequent on membership in the partnership, association, or company at the time of the creation of the liability upon which the judgment was recovered. As to the partnership, association, or company the judgment is conclusive. It is also conclusive in respect to all matters involved in the suit upon all persons who were members when the liability merged in the judgment was created. All such persons had an "original liability" within the meaning of section 1183, while persons whose membership had then ceased or did not commence until subsequent thereto, had no such "original liability" as makes them responsible in supplemental proceedings under the statute. It may happen that the original action was based upon several distinct contracts and that the defendants in the supplemental suit were members when some

of the contracts only were made, in which event their liability under the statute would be limited accordingly. Thus "upon their original liability" as it may be made to appear depends their statutory liability, for the amount unpaid on the judgment. In the original action against Protection Lodge, No. 215, the question whether the defendants in this supplemental suit were members of that association at the time when, etc., was not tried or decided, nor involved in the judgment recovered. It follows that whether they were such members is an open question in this suit and one upon which they are entitled to be heard. *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338; *Clark v. Cullen*, 9 Q. B. Div. 355.

It is further contended that since in the original suit against the association no personal service of process was made upon the individual members, they cannot be bound by the judgment, and that to hold otherwise would be to take their property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States. At common law, in a partnership the members do not form a collective whole distinct from the individuals composing it. The rights and liabilities of a partnership are the rights and liabilities of the partners, and are enforceable by and against them individually. The association of which the defendants are alleged to have been members is composed of more than five members, has an associate name, a president, other principal officer, clerk or treasurer. The associate name is nothing more than the collective name for all the members. *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, L. R. 1901, App. Cas. 426; *Lewis & Co. v. Locke*, 41 Vt. 11.

In providing that suits may be brought by or against such partnerships, associations, or companies in their firm, asso-

ciate, or company name, the statute recognizes an entity separate and distinct from the members and specifies in what manner service of process may be made upon it. Yet with this recognition the individual members are none the less concluded by the judgment; for, first, considered as such entity the relation of the members thereto is analogous to the relation of stockholders to a corporate entity. They are so far an integral part of it that in the view of the law they are privy to the proceedings touching the body of which they are members. *King v. Cochran* and *Whitman v. National Bank*, before cited. And, secondly, as we have before seen, in becoming members they impliedly contracted with reference to these provisions of the statute and are bound by them. The implied agreement in this respect covered not only the liability but the method in which the extent of that liability shall be determined. This doctrine was laid down and applied in *King v. Cochran* where the liability of a stockholder in a corporation was involved, and it is equally applicable here. Regarding this principle it is said in *Freeman on Judgments*, Vol. 1, sec. 176, "In many instances, the relation of the nominal parties to the suit to other persons is such that the latter are conclusively bound by a judgment against the former, in the absence of fraud or collusion, although they are not notified of the pendency of the suit, and are not called upon to conduct its prosecution or defence. In respect to the question, Who are these parties whose interests are thus inseparably associated? the decisions are often inconsistent; but undoubtedly the general principle sanctioned by a vast preponderance of authority is, that every person who has made an unqualified agreement to become responsible for the results of a litigation, or upon whom such responsibility is cast by operation of law in the absence of any agreement, is conclusively bound by the judgment." It follows that the de-

fendants' property is not being taken without due process of law, for no fundamental rights secured by the Fourteenth Amendment are denied, and the forms of procedure in the state courts are not controlled thereby. *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 230, 44 L. ed. 747.

One of the defendants moved to dismiss the suit for that the alleged cause of action set forth in the declaration is not founded on contract, express or implied, hence it being brought by trustee process the court is without jurisdiction. We have already seen that the liability of the members under the statute upon which the action is based is contractual in nature. The action is therefore founded on an implied contract and properly brought by trustee process. V. S. 1304.

The exception by the Delaware & Hudson Company to the overruling of the motion to quash the return of service upon it is not relied upon here.

The pro forma judgment overruling the motion to dismiss, overruling the motion to quash, and overruling the demurrer and adjudging the declaration sufficient, is affirmed, and cause remanded.

TERRANCE MCKANE v. MARR & GORDON.

January Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, POWERS, and MILES, JJ.

Opinion filed May 11, 1906.

Master and Servant—Injuries to Servant—Master's Knowledge—Vice Principal — Evidence — Sufficiency — Contributory Negligence—Question for Jury.

In an action by a quarryman for injuries caused by the explosion of powder in a drillhole that had been fired without affecting the tamping, and which plaintiff was drilling out under the direction of his foreman and on his assurance that the powder had exploded, evidence that it was the duty of the powder-man to load and fire the holes and to determine by the sound and by the condition of the tamping whether they had exploded,—a matter lying between him and the foreman; that the man who loads a hole can determine better than anyone else whether it has exploded; that a quarryman has nothing to do with such duties; that the powder-man loaded and fired the hole in question; and was present when plaintiff was sent to clean out the hole, was admissible to show that the foreman had, or could have had, superior knowledge as to the condition of the hole, notwithstanding that the declaration does not charge negligence in respect of the powder-man.

It being conceded that the foreman was vice-principal, it was his duty to make careful inspection and investigation, including inquiry regarding the hole and the tamping therein, to ascertain whether the powder had been exploded, before directing plaintiff to clean it out; and defendants are chargeable with whatever knowledge the foreman had or ought to have had, concerning the situation.

Plaintiff had a right to presume that the foreman had performed his duty in ascertaining, or attempting to ascertain, whether the powder had exploded, and to rely on his assurance that it had.

In an action by a quarryman for injuries received while cleaning out a powder hole supposed to have been exploded, evidence examined, and held insufficient to show that the use of a hammer constituted contributory negligence as matter of law.

In an action by a quarryman for injuries received while cleaning out a powder hole supposed to have been exploded, evidence examined, and held insufficient to show assumption of risk as matter of law.

CASE for negligence. Plea, the general issue. Trial by jury at the March Term, 1905, Washington County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case. This case has been once before in the Supreme Court; see 77 Vt. 7.

Senter & Senter, and *W. A. Lord* for the defendants.

The admission of evidence relating to the powder-man was error, because the declaration does not charge defendants with any shortage of duty in that respect; and plaintiff can recover only *secundum allegata et probata*, and can legally prove no material fact which the declaration does not allege. *Thomas v. Railroad*, 58 S. W. 910; *Union Pac. R. R. Co. v. Buck*, 44 Pac. 304; *San Antonio R. R. Co. v. Flate*, 35 S. W. 859; *Harper v. Indianapolis R. R. Co.*, 44 Mo. 488; *Buffington v. Railroad*, 64 Mo. 246; *Waldheir v. R. R. Co.*, 71 Mo. 517; *Price v. Railroad*, 72 Mo. 414; *Long v. Doxey*, 60 Ind. 385; *Thomas v. Railroad*, 40 Ga. 231; *Missouri Pac. R. R. v. Hennesey*, 75 Tex. 155; *Chicago R. R. Co. v. Young*, 26 Ill. App. 115; *Batterson v. R. R. Co.*, 49 Mich. 185; *Eden v. R. R. Co.*, 72 Mo. 212; *Straight v. Odell*, 13 Ill. App. 232.

M. M. Gordon and *Richard A. Hoar* for the plaintiff.

A declaration which charges negligence in general terms is sufficient; and under such a declaration any circumstances tending to show negligence which contributed to the injury may be proved. 28 N. E. Rep. 1113; 28 Am. St. Rep. 203; *International & G. N. R. Co. v. Dyer*, 76 Tex. 156; *Fisher*

v. *Gollday*, 38 Mo. App. 531; *Cunningham v. Union Pac. Ry. Co.*, 7 Pac. 795; *Omaha & Valley R. Co. v. Wright*, 49 Neb. 456; *Town of Rushville v. Adams*, 107 Ind. 475; *Mississinewa Min. Co. v. Paton*, 28 Am. St. Rep. 203; *Clark v. Chicago &c. R. R. Co.*, 15 Fed. Rep. 588; *Jones v. White*, 90 Ind. 255; *Lucas v. Wattles*, 49 Mich. 380; *State v. Manchester & Lawrence R. R. Co.*, 52 N. H. 528. Black's Law and Practice Accident Cases § 222; *Manley v. Delaware &c. Canal Co.*, 68 Vt. 101.

Plaintiff had a right to assume that defendants exercised ordinary care in providing a safe place to work, and he had a right to rely on the assurance that the powder had exploded. *Thompson Neg.* § 3765; *Himrod Coal Co. v. Clark*, 99 Ill. App. 332; *Zanza v. Le Grand Quarry Co.*, 115 Ia. 299; *Alton Lime &c. Co. v. Calvey*, 47 Ill. App. 343; *Shannon v. Consolidated Tiger &c. Min. Co.*, 24 Wash. 119.

"Where the evidence is conflicting upon a particular issue it should be submitted to the jury; and the court cannot, as matter of law, hold a party guilty of contributory negligence where there is a conflict of testimony upon the material issue in dispute."

Latremouille v. Bennington R. R. Co., 63 Vt. 344; *St. Johnsbury v. Thompson*, 59 Vt. 300; *Vinton v. Schwab*, 32 Vt. 612; *Burrows v. Stebbins & Kennedy*, 26 Vt. 659; *Stephenson v. Clark*, 20 Vt. 624; *Hall v. Parsons*, 17 Vt. 271; *Wilson v. Hooper*, 12 Vt. 653; *Rothchild v. Rowe*, 44 Vt. 389. "The mere fact that a servant works in a place which he thinks to be unsafe does not, as a matter of law, constitute contributory negligence if he was assured by the master that there was no danger, and commanded to go on with the work." *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125-136; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 69; *Malcom v. Fuller*, 25

N. E. 83; *McKeef v. Townellotte*, 44 N. E. 1071; *Cook v. St. Paul &c. R. R. Co.*, 34 Minn. 45.

WATSON J. The evidence of the plaintiff tended to show that the defendants were engaged as partners in quarrying granite and that the plaintiff was in their employ as a quarryman to work on their quarry as a plug driller, and had been employed there for a long time prior to the accident in which he received his injuries; that one O'Hearn had general charge of the work on the quarry, and at the time of the accident the plaintiff was under the general direction of O'Hearn as foreman. It was conceded that O'Hearn was vice-principal. The plaintiff's evidence further tended to show that on the afternoon before the accident two Lewis holes drilled in the quarry had been loaded with black powder and an attempt made to fire them, but as the result of such attempt an explosion took place and a crack extended between the holes, yet the tamping was not blown out; that on the morning of the accident O'Hearn told the plaintiff, then engaged in plug drilling, to take a drill and clean out the two Lewis holes, saying they were fired the night before but did not blow out the tamping. Whereupon the plaintiff asked him if he were sure the holes "went off," to which O'Hearn replied, "yes, go up and get a drill and go up and clean out them holes"; that the plaintiff pursuant to such orders and without objection on his part then took a drill and went to do as directed, but before he commenced he asked other employees on the quarry, who were his fellow servants, if the holes had exploded the night before, and they replied that they had; that after he had worked some time drilling out the tamping by "churning" with the drill, he called to a fellow servant and quarryman working nearby, to give him a few blows, which the fellow servant did, striking his hammer on the drill

held by the plaintiff; that after some blows had been struck an explosion occurred, resulting in the plaintiff's injury.

Defendants excepted to the admission of evidence relating to the powder-man and his duties, on the grounds (1) that they are not charged with the negligence of the powder-man; (2) that the powder-man was a fellow servant, and his negligence was not imputable to the defendants; and (3) that there is nothing in the declaration charging negligence on the part of defendants as far as the powder-man was concerned. Counsel for plaintiff stated that the evidence was on the question of defendants' superior knowledge.

The evidence thus admitted tended to show that one Moore was the powder-man at the time of the accident; that it was his duty to take charge of the powder and of dynamite caps, and to load and fire holes; that if any of the holes had misfired or had not blown out the tamping it was his duty to clean them out and fire them over again; that he would know just how the holes were loaded and for that reason no one else could tell so well as he whether any particular hole had misfired; that if the powder-man does not hear the report, he generally looks for the result, and if no result is to be seen, he makes up his mind that the powder did not go off; that the man who loads a hole knows how he tamps it, how much air chamber is left, whether the tamping is in loose or hard, and if it was tamped loose and in digging it out he finds the tamping hard, it is an indication that the powder went off and pressed against the tamping; that the matter of finding this out generally lies between the foreman and the powder-man; that a person who had nothing to do with charging the hole could not tell from the character of the tamping whether the hole had fired or not; that a quarryman has nothing to do with the handling of pow-

der; that the man who loaded a hole with powder and tamped it could tell after it had ignited, by examination, whether the powder in the hole had exploded or not, and that no one else could very well; that a quarryman works "plug drilling, twist drilling, glutting up stone, and helping to get them out," but has nothing to do with the handling of powder; and that Moore, the powder-man, loaded and attempted to fire the hole in question the night before, and was at work on the quarry the morning of the accident. The case shows that the plaintiff did not have anything to do with the loading or firing of the hole.

It was the duty of O'Hearn, as vice-principal, to make careful inspection and investigation including inquiry regarding the condition of the hole and the tamping therein, to ascertain as far as he could in the exercise of requisite care, whether the hole had fired, before directing the plaintiff thus to clean it out. The defendants are chargeable with whatever knowledge O'Hearn had or ought to have had concerning the situation. The powder-man who loaded the hole was then on the quarry, at O'Hearn's command and subject to his inquiry. Whether O'Hearn had or ought to have had knowledge superior to that possessed by the plaintiff was a material question upon which the evidence, to which objection was made, had a bearing. Irrespective therefore of the questions raised by the exception touching the declaration, the evidence was properly received. *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125, 52 Atl. 526.

At the close of the evidence the defendants moved for a verdict on the grounds that all the evidence in the case shows (1) that the defendants were not guilty of negligence; (2) that the negligence of the plaintiff contributed to the accident; and (3) that the accident resulted from a risk which the plaintiff

took and assumed as an ordinary risk incident to his employment. To the overruling of this motion the defendants excepted. No reliance is placed upon the first ground.

It is urged that upon the uncontradicted evidence the proximate cause of the accident must have been the blow on the drill given by the fellow servant, and that this result was the immediate and natural consequence of the act of the plaintiff himself.

The defendants' evidence tended to show that the plaintiff was employed to work on the quarry, to do anything there to be done; that he was an old and experienced quarryman and had had experience in loading and unloading holes which had been charged like the one in question; that the plaintiff knew there was no way of ascertaining from external appearances whether a hole charged had been fired or not when the tamping had not been blown out, as in this case; that the plaintiff admitted that he knew that the use of a hammer in cleaning out such holes increased the risk when any unexploded powder remained therein; and that the defendants and their foreman did not sanction the use of a hammer in removing tamping from holes of this character, and never knowingly allowed one to be used.

The plaintiff's instructions were to clean out the holes with a drill. No particular method of using the drill was specified. After "churning," that is, striking with the drill, for some time he called the fellow servant to give a few blows with a hammer and while being thus assisted the accident occurred. It is true that the hammer was used at the plaintiff's request, but the testimony given by O'Hearn and by some other experienced quarrymen was to the effect that the danger was not increased thereby. O'Hearn also testified to several ways by which holes are unloaded where the tamp-

ing has not blown out, one of which was to "clean 'them out with a drill." According to plaintiff's testimony, he was by command of the master outside of his regular employment, doing work which was attended with special danger. The plaintiff had a right to presume that O'Hearn had performed his duty in ascertaining or attempting to ascertain whether the powder had exploded, and to rely on his assurance that it had. In these circumstances it cannot be said as a matter of law that in using the hammer the plaintiff was guilty of contributory negligence. Neither can it be said as a matter of law that the accident resulted from a risk which the plaintiff assumed as an incident to his employment. When this case was here before (77 Vt. 7, 58 Atl. 721) the Court, holding that the defendants were entitled to instructions to the jury upon the question of assumed risks, said: "The plaintiff assumed more than the duty of taking ordinary care for his safety. He assumed the risk of known and obvious dangers ordinarily incident to his employment, including the risk of dangers that could not be detected nor avoided by ordinary care. He could not relieve himself from this burden by relying on the assurances of the foreman in a matter regarding which he knew or ought to have known that the foreman had no superior knowledge. If the evidence afforded a basis for the claim that the plaintiff knew or ought to have known that O'Hearn had no superior knowledge regarding the situation, and that an unexploded charge might be under the tamping whatever the indications to the contrary, the defendants were entitled to a charge upon this subject." But in the case as now presented, the plaintiff's evidence tends to show that since the plaintiff had nothing to do with charging the hole, he could not in the exercise of that degree of care required have told whether the powder had exploded or not. It further tends to show that

O'Hearn had or ought to have had superior knowledge concerning the situation and the condition of the charge, and that by the proper exercise of care on his part the danger might have been detected and avoided. In *Laflam v. Missisquoi Pulp Company*, it is said "that while the servant assumes the ordinary risks of his employment and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risk to which he may be exposed. He has the right to presume that the master will do his duty in that respect, so that, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence, or the assumption of risk of so doing, but he must not rashly and deliberately expose himself to unnecessary and unreasonable risks, which he knew and appreciated." And in *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097, it is said that "when a servant shows that his injury was caused by a danger not usually and ordinarily incident to the business, and which ought not to have existed, and would not have existed had the master performed his duty to him, and of which he neither knew nor was negligent in not knowing, the master is liable. It is not enough for the master in such a case that the servant was apprehensive merely of possible danger, especially when, as here, the master himself, knowing the circumstances, did not believe the danger to exist."

The motion was properly overruled. No other points are discussed in defendants' brief.

Judgment is affirmed.

WILLIAM A. HARRIS ET AL. v. CHARLES P. HARRIS ET ALS.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, POWERS,
and MILES, JJ.

Opinion filed May 18, 1906.

*Wills—Actions for Construction—Jurisdiction—Court of
Chancery—No. 40 Acts 1896.*

Before the enactment of No. 40, Acts 1896, it was uniformly held that probate courts had exclusive original jurisdiction in the settlement of decedents' estates, and that the jurisdiction of the court of chancery in respect of such estates was special and limited, and could be invoked only in aid of the probate court when its powers were inadequate.

Under No. 40, Acts 1896, which provides that "in all cases where the terms of a will are doubtful or in dispute," any interested legatee, devisee, or heir may bring a bill in chancery to have the will construed, some discretion is still left with the court of chancery as to whether it will take jurisdiction.

Before the court of chancery takes jurisdiction, under No. 40, Acts 1896, of a case pending in probate court and thus departs from a long established practice, it must decide whether any terms of the will are in such doubt as to require the intervention of the court of chancery for the purpose of giving them proper construction, and also whether the terms of the will are in dispute within the meaning of the Act.

Where a will bequeathing property in trust was duly probated, and the trust having terminated the property is ready for distribution, the court of chancery will not take jurisdiction of a bill brought by legatees, under No. 40, Acts 1896, to construe the will in advance of a decree of distribution by the probate court. Such case is not within the intent of said Act.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the September Term, 1905, Rutland County, *Watson*, Chancellor. Decree, *pro forma*, sustaining the demurrer and dis-

missing the bill. The defendants appealed. The opinion sufficiently states the case.

Butler & Moloney for the orators.

Under the act of 1896 the court of chancery is compelled to take jurisdiction. There is no discretion. *Dieter v. Shafter*, 70 Vt. 150.

M. C. Webber, and *E. L. Waterman* for the defendants.

TYLER, J. Joel B. Harris died April 17, 1891, leaving a will which was duly probated and allowed. His entire estate, after the payment of debts and funeral expenses, amounted to about \$270,000 and was left to trustees. In accordance with the requirements of the will, the executors, after the debts were paid, passed the estate over to the trustees, who were to hold and manage it until the widow of the testator reached the age of seventy years, which time has now elapsed. The legatees brought a bill in the court of chancery praying for a construction of the will, to which the defendants demurred. The case comes here upon the *pro forma* decree of that court dismissing the bill.

By V. S. 2325 the exclusive original jurisdiction of the estates of deceased persons is conferred upon probate courts, and it has been uniformly held that the court of chancery has not original nor concurrent jurisdiction; that its jurisdiction is special and limited and can only be invoked in aid of the probate court when its powers are inadequate. *Goff v. Robinson*, 60 Vt. p. 641, 15 Atl. 339. In *Hotchkiss v. Ladd's Estate*, 62 Vt. 209, 19 Atl. 638, the Court remarked that the probate court, under our statute, has plenary jurisdiction over the probate of wills, and that it may do any and all things essen-

tial to make its action effective. In *Blair, Admr. v. Heirs of Johnson*, 64 Vt. 598, 24 Atl. 764, after a clear statement of the rule, the Court added: "Further than that, the court of chancery has nothing to do with the settlement of such estates. It follows, therefore, that if, at the time a question as to the construction of a will needs to be decided, the probate court can be resorted to and its jurisdiction is adequate for the purpose, that court must be resorted to and chancery cannot be." In *Ward and Wife v. Church*, 66 Vt. 490, 29 Atl. 770, a bill in chancery was brought praying for the construction of a will, but it was dismissed, the Court holding that in distributing the estate, on the settlement thereof, it was the province of the probate court to determine and adjudge the kind of estate which the oratrix took in the property of her father, under the will and the laws of the State, and that if that court entertained and passed upon that question the court of chancery had no jurisdiction to review its decree. In *Davis v. Eastman*, 66 Vt. 651, 30 Atl. 1, after restating the rule the Court said: "It is emphatically required by the whole tenor of our decisions that the court of equity withhold its hand unless a necessity for its interference clearly appears."

The foregoing cases carry out the idea expressed in *Powers v. Powers' Estate*, 57 Vt. 49, as follows: "Our probate code has grown up into a system by itself, the leading idea of which is to confer upon the probate court exclusive jurisdiction in the settlement of estates." This doctrine is also fully expounded in *Bowers v. Smith*, 10 Paige 193, 4 Law. ed. 940, *Emmons v. Cairns*, 2 Sand. Ch. 369, 7 Law. ed. 629, and in Pom. Eq. Jur. §§ 1156, 1157, authorities cited in the opinion in *Morse, Exr. v. Lyman*, 64 Vt. 167, 24 Atl. 763. In the recent case of *Beard v. Beard*, decided by the Court of Chancery of New Jersey, the Vice Chancellor said that a bill by

an executrix of a will asking for no instructions concerning her duties, and showing no case requiring the consideration of any trust, but merely seeking the court's opinion as to the legal title of certain real estate devised by the testator, shows no jurisdiction in the court, and will be dismissed.

It cannot be maintained that the court of chancery may take jurisdiction in the present case upon the ground that that court has jurisdiction over trusts, and that this estate is held in trust, for this trust has been administered and nothing remains to be done other than making a decree of distribution pursuant to the will.

The construction of wills is often necessarily incident to the settlement of estates by probate courts, but if the Act in question is given the broad construction contended for by the orators, the powers that those courts have hitherto exercised in these matters may at any time be assumed by the court of chancery upon the bringing of a bill by one of the persons named in the Act of 1896, and before any question in respect to distribution has arisen in the probate court, merely alleging that the terms of a will already proved are doubtful or in dispute. In this case the occasion for the legatees coming into the court of chancery is alleged to be to enable the trustees to make proper distribution of the estate according to the true intent and meaning of the will.

The Act of 1896 reads: "In all cases where the terms of a will are doubtful, or in dispute, any person interested in the estate, either as legatee, devisee, or heir at law, may bring a bill in chancery to have the will construed, and the court of chancery, or the Supreme Court on appeal, shall proceed to construe the will, which decision shall be binding on parties who are served with process and all who appear in the case

by counsel, notwithstanding it appears that others may at some future time become interested under the will."

The questions suggested in the orators' brief that are likely to arise before the distribution is made are in substance as follows: What constitutes the advancement account referred to in section 10 of the will, and what entries, if any, in the ledger should be construed as part thereof, and what credits thereon should be allowed Charles P. and Wm. A. Harris; whether the pencil memoranda upon the ledger should be read into the will; whether the daughters of the testator should be entitled as legatees to receive, before the residue of the estate is divided, an amount of property sufficient to make their share equal to the amount of advancements made to the sons, and how much interest, if any, should be computed thereon, or whether the several sums of \$15,000 bequeathed to each of the daughters and the sums advanced to the sons should be treated as specific legacies and that after the payment thereof the residue should be equally divided among the legatees; whether unmarried daughters of the testator should share equally with his married daughters under a decree of distribution, whether a certain granddaughter should be chargeable with advancements that were made to her mother. It is also claimed that questions will arise in relation to interest upon deferred payments.

It is true that it is alleged in the bill that great injustice may be done if the trustees are compelled to distribute the fund without an interpretation of the will by the court of chancery, but it must be presumed that the probate court will make a proper decree. If it makes an erroneous decree, the orators will have their remedy as hereafter indicated. On the other hand, if the prayer of the bill is granted and the court of chancery is permitted to take jurisdiction, it is obvious that

the case will have to go to a master to determine all questions of fact, and upon his report the court of chancery will make a decree determinative of the question of distribution.

In cases where the aid of the court of chancery has heretofore been granted the decrees of that court have been in aid of probate courts, like deciding which of two or more persons is entitled to a bequest, or what estate passes under a certain devise, without divesting the probate court of its jurisdiction; but in this case the prayer is in effect to transfer jurisdiction from one court to another which is in direct contravention of the rule given by Judge Redfield in *Adams v. Adams*, 22 Vt. p. 58, and restated in substance in several later decisions.

But the orators contend that these authorities are not controlling since the passage of the Act of 1896; that while it was discretionary with the court of chancery to give aid to probate courts in certain cases, it is now its duty to take ancillary jurisdiction in cases that come within the Act. It must however be conceded that some discretion must still be left with that court. The demurrer in this case raises the preliminary question to be decided by the court of chancery and reviewed here, whether any terms of the will are in such doubt as to require the intervention of that court for the purpose of giving them proper construction. It must also determine whether the terms of the will are in dispute in such a manner as the Act contemplates before it takes jurisdiction of a case pending in the probate court and thus departs from a long established system of procedure. We think the Legislature could not have intended by this Act to make so radical a change in our probate code as the orators contend for. It is doubtless true that the Act makes it the duty of the court of chancery to construe wills in certain cases where there is

occasion for its intervention, but that court must decide whether or not an occasion has arisen. It is alleged that the trustees have prepared and are ready to file their account in the probate court; that about \$257,000 will be for distribution and that certain provisions of the will are doubtful and in dispute. At the time this bill in chancery was filed the estate was nearing a final settlement and a decree of distribution in the probate court, a court authorized by law to make such decrees and competent to make them. From any supposed error of that court, in the reduction of the legacies by advancements made by the testator by reference to extrinsic documents, or upon other grounds any person interested in the decree, who feels himself aggrieved thereby will have a right of appeal to the county court, from whose decree exceptions will lie to this Court, therefore there is no present occasion for the intervention of the court of chancery. As was said by the Court in *Osgood v. Cen. Vt. Ry. Co.*, 77 Vt. 334, 60 Atl. 137, the case does not fall within the spirit and intent of the Act.

The pro forma decree is affirmed and cause remanded.

STATE v. JOHN HURLEY.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed May 21, 1906.

To constitute an attempt to commit a crime, the act must be of such a character as to advance the conduct of the actor beyond the

sphere of mere intent. It must reach far enough towards accomplishment of the desired result to amount to the commencement of the consummation.

The mere facts that a prisoner lawfully in jail arranged for procuring saws adapted to jail breaking, and thereby got them into his possession, with the intent therewith to break open the jail for the purpose of escaping, did not constitute an attempt to break jail.

INFORMATION for an attempt to break out of a common jail. Plea, not guilty. Trial by jury at the December Term, 1905, Windsor County, *Miles*, J., presiding. Verdict guilty; and judgment thereon. The respondent excepted. The respondent also demurred to the information. Demurrer overruled, and information adjudged sufficient, to which respondent excepted. Exception ordered to lie. The opinion states the case. The information charged only:

"That the said John Hurley at Woodstock in said County, heretofore, to wit, on the first day of November, 1905, with force and arms, he the said John Hurley being then and there confined by the authority of the State of Vermont, in the common jail within and for the County of Windsor aforesaid, as a prisoner therein, did then and there feloniously attempt to break open said jail by then and there procuring to be delivered into his hands in said jail twelve hack saws, with the intent then and there with said hack saws, then and there to break open said jail."

Gilbert A. Davis for the respondent.

Charles Batchelder, State's Attorney, for the State.

An act adapted to accomplish the crime is an attempt.
1 Bishop, New Crim. Law, 765; *Graham v. People*, 181 Ill. 477; *Griffin v. State*, 26 Ga. 493.

MUNSON, J. The respondent is informed against for attempting to break open the jail in which he was confined by procuring to be delivered into his hands twelve steel hack saws, with an intent to break open the jail therewith. The State's evidence tended to show that in pursuance of an arrangement between the respondent and one Tracy, a former inmate, Tracy attempted to get a bundle of hack saws to the respondent by throwing it to him as he sat behind the bars at an open window, and that the respondent reached through the bars and got the bundle into his hands, but was ordered at that moment by the jailor to drop it, and did so. The Court charged in substance that if the respondent arranged for procuring the saws and got them into his possession, with an intent to break open the jail for the purpose of escaping, he was guilty of the offence alleged. The respondent demurred to the information and excepted to the charge.

Bishop defines a criminal attempt to be "an intent to do a particular criminal thing, with an act toward it falling short of the thing intended." 2 Cr. Law § 728. The main difficulty in applying this definition lies in determining the relation which the act done must sustain to the completed offence. That relation is more fully indicated in the following definition given by Stephen: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." Dig. Cr. Law 33. All acts done in preparation are, in a sense, acts done toward the accomplishment of the thing contemplated. But most authorities certainly hold, and many of them state specifically, that the act must be something more than mere preparation. Acts of preparation, however, may have such proximity to the place where the intended crime is to be committed, and

such connection with a purpose of present accomplishment, that they will amount to an attempt. See note to *People v. Moran*, 20 Am. St. 741; *People v. Stites*, 75 Cal. 570; *People v. Lawton*, 56 Barb. 126.

Various rules have been formulated in elucidating this subject. Some acts toward the commission of the crime are too remote for the law to notice. The act need not be the one next preceding that needed to complete the crime. Preparations made at a distance from the place where the offence is to be committed are ordinarily too remote to satisfy the requirement. 1 Bish. Cr. Law, §§ 759, 762 (4) 763. The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended. 3 A. & E. Ency. Law, 2 Ed. 266, n. 7. The act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. *Hicks v. Com.*, 86 Va. 223.

But after all that has been said, the application is difficult. One of the best known cases where acts of preparation were held insufficient is *People v. Murray*, 14 Cal. 159, which was an indictment for an attempt to contract an incestuous marriage. There the defendant had eloped with his niece with the avowed purpose of marrying her, and had taken measures to procure the attendance of a magistrate to perform the ceremony. In disposing of the case Judge Field said: "Between preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."

Mr. Bishop thinks this case is near the dividing line, and doubts if it will be followed by all courts. 1 Cr. Law, § 763 (3). Mr. Wharton considers the holding an undue extension of the doctrine that preliminary preparations are insufficient. Cr. Law, § 181 n. But the case has been cited with approval by courts of high standing.

The exact inquiry presented by the case before us is whether the procurement of the means of committing the offence is to be treated as a preparation for the attempt, or as the attempt itself. In considering this question it must be remembered that there are some acts, preparatory in their character, which the law treats as substantive offences; for instance, the procuring of tools for the purpose of counterfeiting, and of indecent prints with intent to publish them. Comments upon cases of this character may lead to confusion if not correctly apprehended. Wharton Cr. Law, § 180 and n. 1.

The case of *Griffin v. The State*, 26 Ga. 493, cited by the respondent, cannot be accepted as an authority in his favor. There the defendant was charged with attempting to break into a storehouse with intent to steal, by procuring an impression of the key to the lock and preparing from this impression a false key to fit the lock. The section of the penal code upon which the indictment was based provides for the indictment of any one who "shall attempt to commit an offence prohibited by law, and in such an attempt shall do any act toward the commission of such offence. * *" The Court considered that the General Assembly used the word "attempt" as synonymous with "intend" and that the object of the enactment was to punish "intents," if demonstrated by an act. The Court cited *Rex v. Sutton*, 2 Str. 1074, as a strong authority in support of the indictment. There, the prisoner was con-

victed for having in his possession iron stamps, with intent to impress the sceptres on sixpences. This was not an indictment for an attempt, but for the offence of possessing tools for counterfeiting with intent to use them. The Georgia Court, by its construction of the statute, relieved itself from the distinction between "attempts" and crimes of procuring or possessing with unlawful intent.

The act in question here is the procuring by a prisoner of tools adapted to jail breaking. That act stands entirely unconnected with any further act looking to their use. It is true that the respondent procured them with the design of breaking jail. But he had not put that design into execution, and might never have done so. He had procured the means of making the attempt, but the attempt itself was still in abeyance. Its inauguration depended upon the choice of an occasion and a further resolve. That stage was never reached, and the procuring of the tools remained an isolated act. To constitute an attempt, a preparatory act of this nature must be connected with the accomplishment of the intended crime by something more than a general design.

Exceptions sustained, judgment and verdict set aside, demurrer sustained, information held insufficient and quashed, and respondent discharged.

IN RE WILLIAM F. MCKENNA.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed May 21, 1906.

Prisoners—Term of Imprisonment—Reduction by Good Behavior—Forfeiture—V. S. 5274.

The deduction of time for good behavior allowed a prisoner in the state prison pursuant to V. S. 5274, is not forfeited by a breach of a subsequent conditional pardon.

When a prisoner who has been at large on a conditional pardon is recommitted to serve the remainder of his term, the time he has been so at large is not to be treated as time served on his sentence.

HABEAS CORPUS returnable at Montpelier in Washington County before Rowell, C. J., and by him duly adjourned into the Supreme Court at its May Term, 1906, and heard at that term.

Charles Batchelder for the relator.

Clarke C. Fitts, Attorney General, for the respondent.

MUNSON, J. The relator was committed to the state prison March 16, 1905, under a sentence of imprisonment for a term of not more than fifteen months and not less than twelve months. January 25, 1906, he was released from confinement on accepting a conditional pardon, which provided that upon a violation of its conditions the pardon should become void, and he be returned to his former condition of custody to serve the remainder of his term. During this confinement his behavior was such that he was allowed five days on each

month in reduction of his sentence, pursuant to V. S. 5274. March 15, 1906, he was returned to the state prison to serve the remainder of his term, upon an order of recommitment which recited a violation of the conditions of his pardon. The relator claims that his present detention is unlawful because of the expiration of his sentence.

We do not consider it necessary to discuss the questions raised by the petition. The subject of conditional pardons was examined by the judges in preparing a reply to inquiries submitted by the Governor in 1901, and the results of their examination will be found in *Re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10.

The sentence is for the maximum term, and the allowance for good behavior is to be deducted from the maximum term. The deduction allowed for good behavior previous to the conditional pardon is not forfeited by the breach of the conditions of the pardon, but stands to the credit of the prisoner in the final computation of his sentence. When a prisoner who has been at large on a conditional pardon is recommitted to serve the remainder of his term, the time he has so been at large is not to be treated as time served on his sentence. The remainder of the term to be served on recommitment is that part of the term that remained unexpired at the time he was set at large by the conditional pardon.

Relator remanded.

HOGAN & HOGAN v. NORA SULLIVAN.

October Term, 1905.

Present: TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 26, 1906.

Book Account—Auditor's Report—Auditor's Submission of Questions of Law by General Reference—Objections to Report—How Raised—Supreme Court—Questions Reviewable—Joint Promisors—Liability of Survivor—V. S. 2440.

The Supreme Court will review only such questions as the record shows were decided by the county court.

Objections to the report of an auditor, referee, or commissioner based upon the insufficiency or inadmissibility of evidence must be made by exception, motion to recommit, or objection to the acceptance of the report, or they are waived; except that when a question of law is pointed out by an auditor, referee, or commissioner, and referred to the court, no exception to the report need be filed, but in that case good practice requires that the trier should point out such question with the precision required in an exception.

The statement by an auditor in his report that, "All questions of law presented by the foregoing facts are submitted to the court," did not submit to the court any question as to the admissibility or sufficiency of evidence, but only the question of what judgment was required by the facts found.

Pollard v. Barrows, 77 Vt. 1, distinguished.

At common law, the death of a joint promisor discharged his estate, and left the survivor liable for the whole debt.

V. S. 2440 changed this rule of the common law only to the extent of making the estate of a deceased joint promisor liable for the debt, without affecting the liability of the survivor; so that the creditor may now both prove his debt against said estate and sue the surviving promisor.

BOOK ACCOUNT. Heard on the report of an auditor at the March Term, 1905, Franklin County, Rowell, J., presid-

ing. Judgment for the plaintiffs for the amount found due by the auditor. The defendant excepted. No exceptions to the auditor's report were filed.

The auditor found that the plaintiffs were a firm of practicing lawyers, and that their claim against the defendant consisted of charges for professional services rendered the defendant and her husband for which they were jointly liable; that the husband had deceased; that commissioners had been appointed upon his estate, and that the plaintiffs had filed the account in question with said commissioners for allowance.

C. G. Austin & Sons for the defendant.

In book account, all persons who are involved in the account should be made parties. This account is found to be joint, and to involve another person who is not a party. This nonjoinder is a bar to a recovery in this form of action. *Loomis v. Barrett*, 4 Vt. 450; *McLaughlin v. Hill*, 6 Vt. 20; *Smith v. Watson*, 14 Vt. 332; *Hagar v. Stone*, 20 Vt. 106; *Hall v. Armstrong*, 65 Vt. 421.

Hogan & Hogan, and *H. C. Royce* for the plaintiffs.

The question of the nonjoinder of a necessary party defendant should have been raised before the auditor, followed by exceptions to the report.

Pratt v. Gallup, 7 Vt. 344; *Gay v. Rogers*, 18 Vt. 342; *Goodale v. Frost*, 59 Vt. 491; *Newell v. Keith*, 11 Vt. 214; *Smith v. Bradley*, 39 Vt. 366.

POWERS, J. The action is book account, and the plaintiffs had judgment in the county court for the amount found

due by an auditor. The auditor found facts on evidence objected to by the defendant, and reached conclusions which the defendant insists were unwarranted by the evidence; but she filed no exceptions to the report, and did not ask that the report be recommitted or rejected. There is nothing in the record to show that the questions of admissibility or sufficiency of evidence here argued were pressed upon the attention of the county court, or considered or passed upon by that court. All the exceptions show is that the case was "heard on auditor's report."

It is a well settled and oft-repeated rule of this Court that no questions will be considered here, except such as appear by the record to have been raised and decided by the county court. *Vilas v. Downer*, 21 Vt. 419; *Walton v. Walton's Est.*, 63 Vt. 513; *Manning v. Leighton*, 66 Vt. 56; 28 Atl. 630; *Barrette v. Laurier*, 69 Vt. 509, 38 Atl. 236; *Parker v. McKannon Bros. & Co.*, 76 Vt. 96, 56 Atl. 536.

The defendant insists that these questions of admissibility and sufficiency of evidence were presented to the county court by virtue of a reference of them to that court by the auditor in his report.

The general rule is that objections of this kind to the report of an auditor, referee or commissioner must be taken by way of exception, motion to recommit, or objection to the acceptance of the report, or they are waived. *Kidder v. Smith*, 34 Vt. 294; *Wilder v. Stanley*, 49 Vt. 105. But when a question of law is pointed out by such auditor, referee or commissioner, and referred to the court, there is no necessity for filing any exceptions to the report. *Sargent v. Sargent's Exrs.*, 18 Vt. 330; *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436. See, also, *Walton v. Walton's Est.*, and *Manning v. Leighton*, *supra*. In such case the question referred is properly before

the county court and available to the complaining party. The growing tendency, however, of submitting all such questions which arise during the hearing by a general reference is not approved. Good practice requires that the trier should point out each of such questions with the same precision as is demanded in an exception. The court should not be called upon to search through the report to discover the legal questions submitted. The trier should "put his finger" upon the very question reserved for review. This auditor does nothing of the kind. Indeed, he does not, even in general terms, submit any question of admissibility or sufficiency of evidence as was done in *Pollard v. Barrows*, 77 Vt. 1, 58 Atl. 726. "All questions of law," he says, "presented by the foregoing facts are submitted to the court." The only question of law which did or could arise upon the *facts* as found by the auditor was as to what judgment was required by such findings, since a consideration of that question did not, as this report stands, involve a consideration or determination of any question of admissibility or sufficiency of evidence. In these circumstances, the exceptions should have affirmatively shown that these questions were passed upon below.

So the only exception available is to the judgment rendered;—and that was correct. For the findings of the auditor establish a joint obligation on the part of the defendant and her deceased husband; and the settled rule of the common law is that the death of a joint promisor discharges his estate, and leaves the survivor liable for the entire amount of the debt. *Richards v. Heather*, 1 B. & Ald. 29; *Burgoyne v. Ins. & Tr. Co.*, 5 Ohio St. 586; *New Haven & Northern Co. v. Hayden*, 119 Mass. at p. 365; *Moore v. Rogers*, 19 Ill. 347; *Biggs & Co. v. Langhammer & Son*, (Md.) 63 Atl. 198. This rule

is modified by V. S. 2440 to the extent of making the estate of the deceased promisor liable for the debt, but the liability of the survivor is unaffected thereby.

Judgment affirmed.

W. A. BOYCE, SURVIVING PARTNER, v. LEVI J. BOLSTER.

October Term, 1905.

Present, ROWELL, C. J., MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed May 26, 1906.

*Bill of Exceptions—Compliance with County Court Rule—
Presumptions — Witnesses — Competency — Married
Women—Trial—Objections to Witness—Waiver— In-
structions.*

Where a bill of exceptions has been allowed, signed, and filed within the time prescribed by law, the Supreme Court will assume, without inquiry, that the bill was submitted to the adverse party within the time prescribed by County Court Rule 29, or that the case was properly taken out of the rules by the presiding judge.

In an action of assumpsit tried before the passage of No. 60, Acts 1904, making a married woman a competent witness on behalf of her husband, defendant's wife, who acted as his bookkeeper during the time covered by his specifications in offset, was incompetent to testify concerning those items.

Plaintiff objected to the competency of defendant's wife as a witness, and before her testimony was received, plaintiff's counsel, referring to certain items in defendant's specifications in offset, stated: "These entries of the few little store charges, I said, if in her handwriting, and she said they were made out at the time, I had no objections to them, and I haven't now," but later plaintiff

claimed and was allowed an exception to the competency of the wife as witness. *Held*, that plaintiff was not precluded from having the benefit of his exception.

Where, in assumpsit by a surviving partner, one of the items on defendant's specifications in offset was a charge for wood furnished plaintiff after his partner's decease and within six years before the commencement of the suit, and the jury would have been warranted in finding that the understanding between the parties was that such items were to be applied in payment upon the partnership account, it was error to omit to charge as to the effect to be given that item in saving plaintiff's account from the Statute of Limitations.

GENERAL ASSUMPSIT by the surviving partner. Pleas, the general issue, Statute of Limitations, payment and declaration in offset in general assumpsit. Trial by jury at the September Term, 1904, Washington County, *Tyler, J.*, presiding. Verdict and judgment for the defendant. The plaintiff excepted.

W. A. Boyce, T. J. Deavitt, and Edward H. Deavitt for the plaintiff.

The fact that the load of wood was delivered to the surviving partner did not prevent it from being a payment on the partnership account. *Thrall v. Seward*, 37 Vt. 573; *Stebbins v. Willard*, 53 Vt. 665, 668; *Holt v. Howard*, 77 Vt. 49.

J. P. Lamson for the defendant.

POWERS, J. The defendant moves to dismiss these exceptions on the ground that the bill was not submitted to him within the time specified in, and as required by County Court Rule 29.

It is a matter of regret that the requirements of this rule are too often disregarded; but we deem the whole subject to

be one to be considered and dealt with by the presiding judge of the trial court. The rule is a rule of that court. It expressly provides that the times therein limited may be extended by special leave of the presiding judge; and Rule 46 empowers the presiding judge, when it is for him alone to act, to take a case out of the rules entirely. So when a bill is allowed and signed within the time prescribed by law, and the case comes to this Court, we will assume without inquiry that the preliminary steps relative thereto have been regularly taken, or that the case has been properly taken out of the rules by the presiding judge.

Subject to the plaintiff's objection and exception, the defendant's wife, who had acted as his bookkeeper during the time the items covered by his specification in offset accrued, was allowed to testify concerning such items. Since the trial took place before the passage of No. 60, Acts of 1904, the wife was not a competent witness, *Estabrooks v. Prentiss*, 34 Vt. 457, and the allowance of her testimony was error, unless the plaintiff waived his objection to her competency, as in *Dee v. King*, 77 Vt. 230, 59 Atl. 839, or misled the court into the belief that he waived his objection, as in *Buchanan v. Cook*, 70 Vt. 168, 40 Atl. 102.

Before her testimony was received, and during a conference between counsel and court relative thereto, the plaintiff, referring to certain items on the defendant's specification, said: "These entries of the few little store charges, I said if in her handwriting and she said they were made out at the time, I had no objection to them, and I haven't now." Later in such conference, his counsel claimed and was allowed an exception to the competency of the wife as a witness. In the circumstances, this action on behalf of the plaintiff had the effect of withdrawing any concession which the plaintiff had previously made in

that matter, and of giving fair notice to all concerned that he stood on his legal rights regarding the same, and he is not precluded from claiming the benefit of his exception.

One of the items on the defendant's specification in offset was a charge for a load of wood furnished the plaintiff after his partner's decease and within the six years preceding the commencement of the suit. From the evidence attached to the bill of exceptions, the jury would have been warranted in finding that it was the understanding between the parties that such items were to be applied as payments upon the partnership account. The court, therefore, should have instructed the jury as to the effect which might be given to this item in saving the plaintiff's account from the statute of limitations, and the omission so to do was error.

Judgment reversed and cause remanded.

W. O. BALDWIN, RECEIVER, v. SPEAR BROTHERS ET AL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed May 26, 1906.

Mechanics' Liens—Requisites of Memorandum Required by V. S. 2273—Effect of Appointing a Receiver of Owner—Sale of Property by Agreement of Receiver and Lienor—Effect.

Though the person asserting a mechanic's lien should be held to a reasonably strict compliance with the statutory requirements,

reasonable compliance is all that is required, and nicety of form is not essential.

The object of the "written memorandum" required by V. S. 2273 to be filed in the town clerk's office by a person claiming a lien on a building, steam engine, or waterwheel, is to give notice to the owner and persons dealing with the property that it stands charged with the payment of the bills for labor and materials which went into it under such a contract as entitles the claimant to his lien.

Such memorandum need not recite the items of the claimant's account, nor state the terms of the contract pursuant to which the labor was performed or materials furnished, nor whether it was in writing, nor give the date when the job was completed or the pay became due, nor specify what part of the claim is for materials and what part for labor.

A written memorandum under V. S. 2273, signed by the claimant, describing the building into which the labor and materials went and which is sought to be charged, and asserting a lien thereon, and which discloses the amount claimed and that it is for such indebtedness as the statute specifies, the person to whom it is due, the person from whom it is due, and that the latter is the owner of the building, is sufficient.

A charge for extra work done and extra materials furnished by the claimant during the performance of the contract was properly included in the claim and constitutes a valid part of the lien.

The rights of a receiver in the property of the receivership vest as of the date of his appointment, and he takes such property subject to all then valid mechanic's liens thereon.

Where, after a creditor has filed in the town clerk's office the requisite memorandum asserting a valid mechanic's lien on certain real estate, and before further proceedings are had, a receiver of the owner is appointed, the property is thereby placed in the custody of the law, subject to said lien; and the only way the lienor can then properly realize upon the property is by a sale thereof under an order of the chancellor, or by a foreclosure of the lien under the statute, with the consent of the chancellor. Permission granted by the chancellor to join the receiver in a suit to perfect the lien would not authorize a sale of the property.

After defendants had filed in the town clerk's office the requisite memorandum asserting a mechanic's lien on certain real estate, the orator was appointed receiver of the owner. Whereupon defendants, with permission of the chancellor, brought suit against

the receiver and said owner to perfect their lien, and caused said real estate to be attached thereon. Thereupon the receiver procured from the chancellor an order permitting him to sell said property, and directing that two prior mortgages should be paid from the proceeds thereof, but making no reference to defendants' lien; and on the same day defendants entered into a written agreement with the receiver consenting to said sale, agreeing to discharge their lien, and stipulating that the avails of the sale, after paying said mortgages, should be held by the receiver to await the determination of the validity of said lien, and in lieu of the property. Thereupon defendants discharged their lien; the receiver sold the property, and, after paying said mortgages from the proceeds thereof, had a residue which defendants claimed on their lien. *Held*, in a suit brought by the receiver to test the validity of said lien, that, the parties having entered into and fulfilled said agreement in good faith, and to secure a prompt and advantageous disposition of the property, it ought to be upheld, and defendants' lien on the fund preserved.

APPEAL IN CHANCERY, Chittenden County. Heard at Chambers January 20, 1905, on bill, answer, and master's report, *Haselton*, Chancellor. Decree, "That the expenses of the receivership be first paid out of the funds in the hands of the receiver, and that the balance in his hands be distributed, *pro rata*, among all the creditors of the Hygiene Company." Spear Bros. appealed. The opinion fully states the case.

H. S. Peck for the orator, *Charles T. Barney*, *H. F. Wolcott*, and *L. D. Latham* for the unsecured creditors who were parties defendant.

Spear Brothers have no rights under V. S. 2273, unless they have strictly complied with its requirements. *Piper v. Hoyt*, 61 Vt. 539; *McIntosh v. Schroeder*, 154 Ill. 520; *Ehadin v. Murphy*, 170 Ill. 389; *Buckley v. Com'l Nat. Bank*, 171 Ill. 284; *Belanger v. Hersy*, 90 Ill. 70; *Crandall v. Lyon*, 188 Ill.

86; *Murry v. Rapley*, 30 Ark. 568; 19 Am. & Eng. Enc. (2nd Ed.) 24; 20 *Ibid*, 388, 389.

The memorandum should recite the contract under which the lien is claimed, or give the substance of it. It should show when the debt became due, and give a statement of the work performed or materials furnished. 20 Am. & Eng. Enc. 349-416; *Springfield Land Assn. v. Ford*, 168 U. S. 513.

The memorandum should show affirmatively that it was filed within the requisite time. *Chappell v. Smith*, 40 Neb. 579.

By discharging their lien, Spear Brothers forfeited all rights thereunder. 20 Am. & Eng. Enc. 519; *Kittredge v. Freeman*, 48 Vt. 62; *Hutchins v. Olcott*, 4 Vt. 549.

Powell & Powell for Spear Brothers.

Courts are reluctant to set aside mechanics' liens. *Montandon v. Deas*, 48 Am. Dec. 84; *Shaw v. Barnes*, 47 Am. Dec. 399 and note; *Kennedy v. House*, 80 Am. Dec. 594.

The agreement between Spear Bros. and the receiver kept the lien alive. It is elementary that a lien will be kept alive where equity requires it, and the parties intended it, and the rights of others have not intervened. *Backer v. Pyne*, 30 Am. St. Rep. 234; 19 Am. & Eng. Enc. 34; *Richards v. Griffith*, 27 Am. St. Rep. 156; *Goble v. Gale*, 41 Am. Dec. 221; *Kilpatrick v. Kansas City R. R. Co.*, 41 Am. St. Rep. 761; *Garwood v. Eldridge*, 34 Am. Dec. 195; *Belknap v. Denison*, 61 Vt. 520; *Howard v. Clark & Teachout*, 71 Vt. 427.

The status of creditors is fixed at the date of the appointment of the receiver, and not at the date of the approval of his bond. 5 Thompson, Neg., § 6919; *McCorkle v. Herman*, 117 N. Y. 298; *Maynard v. Bond*, 67 Mo. 315; *Griffin v. Booth*, 152 Ill. 219.

POWERS, J. This is a bill in chancery brought by the receiver of the Hygiene Milk Company to test the validity of a mechanic's lien asserted by the defendant Spear Bros. on certain premises formerly owned by the Milk Company in the city of Burlington. On or about September 15, 1901, Spear Bros., who were contractors and builders, entered into a written contract with the Milk Company, a corporation, to furnish the materials and erect for the Company on its lot on St. Paul St., a brick block for a specified sum, payable at the completion of the work. Pursuant to that contract, the firm erected the building, completing the same sometime in February, 1902. The exact day on which the work was completed does not satisfactorily appear, and it is not material, for it is not denied that the lien was filed within the statutory period of three months thereafter. Of the contract price, there was due the contractors at the completion of the building the sum of \$2,001.00, which included \$337.05 for extra work done on the building by the contractors during its erection. On March 14, 1902, Spear Bros., in ignorance of the company's insolvency, but as a precautionary measure and intending thereby to assert a lien on the building and lot on which it stood, filed and caused to be recorded in the office of the city clerk of Burlington, a writing of which the following is a copy:

MECHANIC'S LIEN.

SPEAR BROS.	}	City of Burlington, Vermont.
vs.		
HYGIENE MILK CO.		
		March 14, 1902.

KNOW ALL MEN BY THESE PRESENTS: That we, R. A. Spear and W. O. Spear, comprising the firm of Spear Bros., of Burlington, in the State of Vermont, do hereby assert our

lien under Chapter 109 of the Vermont Statutes, and all subsequent acts of the legislature of the State of Vermont, in relation to "Liens," for labor performed and materials furnished by us in the erection [and] building of a building for said Hygiene Milk Co., of the city of Burlington, in said State of Vermont, upon land of said Hygiene Milk Co., situated, bounded and described as follows: The land and premises situated on the west side of St. Paul Street, conveyed by John J. Flynn to said Hygiene Milk Co., deed dated July 19, 1901, and recorded in Vol. 49, page 81, of the Land Records of said city of Burlington, to which said deed and the record thereof [reference] is made in aid of this description, together with all buildings thereon. And our said lien is hereby asserted as aforesaid for the sum of two thousand and one dollars, justly due and payable by the said Hygiene Milk Co. to us, the said Spear Bros., for labor and materials done, performed, furnished and used in the manner aforesaid for the said Hygiene Milk Co., under a contract or agreement with us by them made on or about November 1st, 1901, as per statement or memorandum annexed, in words and figures as follows:

To amount of bill rendered as per agreement. . \$2,001.00

SPEAR BROS.

Witness:

Per W. O. Spear.

Gilbert A. Dow.

On the day before this writing was filed, but without the knowledge of Spear Bros., a creditor of the company instituted a bill in chancery asking that a receiver of the company be appointed. The subpoena attached thereto was dated March 14, was served on the 15th, and the bill was filed in the court of chancery on the 17th,—on which date a receiver

was appointed by Chancellor Stafford. The receiver first appointed declined to serve, and on March 19, the orator was appointed and duly qualified on the same day.

On June 10, 1902, Spear Bros., with leave of the chancellor, brought suit against the Milk Co. and the receiver to perfect their lien, and on the next day, and within three months from the time of filing the memorandum above set out, (the payment of the sum stated being due at the time of such filing), caused said real estate to be attached thereon. That suit is now pending in Chittenden County Court. After that suit was brought, the receiver had an advantageous opportunity to sell the property in question, which was subject to two prior mortgages, and on November 19, 1902, the chancellor signed an order permitting such sale and directing that the two mortgages should be paid out of the proceeds thereof. On the same day, Spear Bros. entered into an agreement with the receiver consenting to such sale, agreeing to discharge their lien and stipulating that the avails of the sale after paying the mortgages should be held by the receiver to await the determination of the validity of such lien, and in lieu of the property. This agreement on the part of Spear Bros. was in writing. On the same day in accordance with their agreement, Spear Bros. discharged their lien in the city clerk's office. The sale was thereupon made, the mortgages paid, and the orator alleges in his bill that he "holds in his hands, in accordance with said agreements with said lienors, such sum of \$1,430.54, subject to the final determination of the rights of said lienors as provided in said agreement." This sum represents the avails of the sale of the real estate in question, after paying the mortgages thereon. This bill was filed with leave of the chancellor February 18, 1903.

The rights of the receiver in this property vested as of the date of his appointment, and he took the property subject to this mechanic's lien, if valid. High Rec. §§ 136, 138. So the first question in the case arises upon the validity of this lien.

The object of the statute creating mechanic's liens is security. The lien is purely statutory, and if established effects a preference. The person asserting it, therefore, should be held to a reasonably strict compliance with the statutory requirements. *Piper v. Hoyt*, 61 Vt. 539, 17 Atl. 798. But the statute is an useful one and should not be so strictly construed as to defeat its purpose, or to render it impossible in the ordinary course of business for one entitled to secure its benefits. A substantial compliance with its terms is all that is required, and nicety of form is not essential. 2 Jones Liens, § 1391. The object of the memorandum required to be filed in the clerk's office is to give notice to the owner and persons dealing with the property that it stands charged with the payment of the bills for labor and materials which went into it under such a contract as entitled the claimant to his lien. In many states the statutory requirements are complicated and perplexing. Ours are plain and simple. An examination of the memorandum here filed discloses: (1) That a lien is asserted; (2) the amount claimed; (3) the person to whom it is due; (4) the person from whom it is due, and that that person is the owner; (5) for what it is due, and that it is for such indebtedness as the statute specifies; (6) the building into which the labor and materials went and which is sought to be charged; and (7) it is signed by the claimant. The requirements of the statute are sufficiently complied with and nothing further is necessary. Phillips Mech. Liens, § 342; *Durling v. Gould*,

83 Me. 134; *Cannon v. Williams*, 14 Colo. 21; 2 Jones Liens, § 1391.

Various objections to the sufficiency of this memorandum are urged and should be briefly noticed: It is not necessary to specify therein whether the contract was in writing or not. That question is entirely immaterial under the statute. 2 Jones Liens, § 1236. The terms of the contract need not be set forth, since the statute does not so require. The word "memorandum" as used in this statute has no peculiar meaning. The words "a written memorandum signed by him asserting his claim," mean no more than "a writing signed by him asserting his claim." Nor does the use of the word "claim" signify that the particulars of the contract or items of the account are to be set forth. This word obviously refers to the claim of a lien. The date when the job was completed or the pay became due need not appear in the absence of statutory requirement. *Cook v. Brick Co.*, 98 Ala. 409; *Doane v. Clinton*, 2 Utah 417; *Boisot Mech. Liens*, § 421. These authorities are in harmony with *Cole, Leavitt & Co. v. Howe*, 50 Vt. 35, wherein it is held that the memorandum evidencing a vendor's lien on personal property may be shown by parol to have been filed and recorded within thirty days from the date of the actual delivery of the property. Nor is it necessary that the memorandum in a case like this, at least, should specify what part of the claim was for materials and what part for labor. This would manifestly be impossible where as here the labor and materials were furnished at a lump sum.

The charge for the extra work and materials furnished by the contractors during the performance of their agreement was properly included in the claim and constitutes a valid part of the lien. Though outside the contract, the extras are so

closely connected with it that they are considered a part of it. Boisot Mech. Liens, § 407; Phillips Mech. Liens, 578; 2 Jones Liens, § 1441; *Sontag v. Doerge*, 14 Mo. App. 577.

Are Spear Bros. entitled to priority in the funds arising from the sale under the agreement? Proper procedure in that behalf would have required that Spear Bros. apply to the chancellor for an order to the receiver to hold the funds in lieu of the property. The property was in the custody of the law, subject to be sure to a valid lien in favor of this firm, and the only way the property could have been realized upon was by a sale under the order of the chancellor or by the chancellor's consenting to a foreclosure of the lien under the statute. The granting of permission to join the receiver in a suit to perfect the lien would not authorize a sale of the property. *Alderson Receivers*, 222; *Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614. No more would such permission warrant a foreclosure. The control of the property was in the hands of the chancellor, and when he ordered a sale of it, it was his duty to protect the lien of Spear Bros. out of the funds arising therefrom. *Alderson Receivers*, 222. When such a lien is thus transferred by order of court and a sale made accordingly, the lien on the funds is preserved. *Mears v. Hayden*, 91 Ill. App. 343. The parties here having, in good faith, and to secure a prompt and advantageous disposition of the property, entered into an agreement transferring the lien, such agreement ought to be upheld and the lien on the funds preserved. It is considered, then, that Spear Bros. are entitled to the avails of the sale of the property in question—\$1,430.54—with accrued interest thereon, if any, free of all charges and expenses, by virtue of their lien originally held on the real estate and transferred to said fund by the agreement referred to.

Decree reversed and cause remanded with mandate to the court of chancery to proceed with the settlement of the estate and distribution of the funds in the hands of the receiver in accordance with the views herein expressed.

IN RE ORDER OF RAILROAD COMMISSIONERS, RUTLAND RAILROAD COMPANY, APPELLANT.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed May 28, 1906.

*Railroad Commissioners—Jurisdiction—Order as to Operation of Railroad—Sufficiency of Notice to Railroad Co.
—V. S. 3987, 3989.*

Where a railroad company on whose road an accident had occurred resulting in death, was duly notified by the Railroad Commissioners to the effect only that at a stated time and place they would conduct a public investigation as to the cause of said accident, said Commissioners had no jurisdiction, upon the conclusion of said investigation, to make an order on said railroad company directing as to the manner of operating its locomotives, though it appeared at said hearing by counsel and participated in said investigation.

Where the Railroad Commissioners exceeded their authority and made such an order on the railroad company, it has a right of appeal therefrom to the Supreme Court by virtue of the statute.

APPEAL to the Supreme Court for the County of Rutland, by the Rutland Railroad Company, from an order of the Rail-

road Commissioners. Heard at the May term, 1906. The opinion states the case.

H. Henry Powers for the Appellant.

Clarke C. Fitts, Attorney General, for the State.

An objection to the jurisdiction of the person is waived by a general appearance, and especially when the person so appearing goes further and appeals, under a statutory provision, to a court of last resort. *Kansas R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 715; *Gay v. Colco*, 33 Am. St. Rep. 122; *In re Crawford*, 96 Am. St. Rep. 648; *Hammond v. Wilder*, 25 Vt. 344; *University v. Joslyn*, 21 Vt. 52; *Collamer v. Page*, 35 Vt. 387.

TYLER, J. It appears that the Railroad Commissioners gave due notice to the Rutland Railroad Co. that they would hold a session at Bennington on November 21, 1905, for the purpose of making public investigation of the cause of an accident to Harris Lindsley and Evelyn P. Willing which occurred on the Rutland Railroad in Bennington, August 14, 1905. The notice contained a request to the Railroad Company to produce before the Commissioners all persons who were in the employment or under the control of the Company who could give pertinent testimony in regard to the accident and all records, reports, train orders and documents which related to the matter.

A meeting was held by the Commissioners pursuant to the notice, when the estates of the decedents and the Railroad Company were represented by counsel and the State by the State's Attorney of Bennington County. An investigation was then made of the cause of the accident, a large number of

witnesses being examined, and the scene of the accident being visited by the Commissioners who subsequently made their report which was in substance, that Mr. Lindsley and Miss Willing were approaching the railroad track from the East, in an automobile, which was running at a high rate of speed, just as passenger train No. 366 of the Railroad Company was approaching from the West, and that a collision occurred at Pike's Crossing resulting in the instant death of Mr. Lindsley and Miss Willing.

The Commissioners found that the primary cause of the accident was the carelessness of the chauffeur of the automobile in running it so fast and in approaching the crossing without using his senses to ascertain whether or not a train was approaching the crossing. It was also found that the Railroad Company was in fault in backing its engine at the head of the train; that the engineer's view of the crossing was somewhat obstructed by the tender to the engine; that if the engine had been headed toward Bennington and the engineer had been upon the watch as he approached the crossing, he could have seen the automobile in season to have slowed the train and avoided the collision; that the Railroad Company had been operating its trains in this manner two years, and that it had facilities for turning its engines at North Bennington so it could have run its engines head forward.

The Commissioners thereupon made an order that on and after January 10, 1906, the Railroad Company should operate its passenger and freight trains on the Bennington branch with the engines ahead and headed in the direction in which the trains were moving. From this order the Railroad Company appealed to this Court.

The hearing of November 21, 1905, was held under V. S. 3987, which only provides for an investigation by the

Commissioners into the cause of an accident that has occurred upon a railroad, and this section requires that they shall make public their conclusions thereon.

The only authority of the Commissioners to make the present order is found in V. S. 3989, as amended by No. 68, Acts of 1902, which is as follows:

“When in the judgment of the Commissioners, after investigation and hearing, upon reasonable notice to all persons interested, it appears * * * that any change * * * in the manner of operating the road and conducting its business is reasonable and expedient in order to promote the security, convenience and accommodation of the public * * * the Commissioners shall order the same, and after giving notice of such orders, may fix a time when the same shall be made. * * * A corporation owning or operating a railroad shall comply with such orders * * * .” For disobedience of such order a heavy fine is imposed.

No notice was given or hearing had under this provision of the statute, therefore, the Commissioners had no authority to make the order in question.

The Railroad Company did not submit to the jurisdiction of the Commissioners to make the order by appearing at the hearing for the reason above stated, that the hearing was held only in pursuance of the notice of the Commissioners to investigate the cause of the accident. When the Commissioners exceeded their authority and made the order, the Railroad Company had a right of appeal therefrom to this Court by virtue of the statute. It now claims that upon a hearing under V. S. 3989, as amended, it can show that it had justifiable cause for running its engine backward.

Judgment that the order of the Commissioners is null and void, and it is set aside and held for naught.

LUCIA WILKINS' ADMR. v. W.W.BROCK AND L. K. ROSSELLE.

May Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed June 12, 1906.

Abatement—Privilege from Service—Process—Service on Absent Defendant—Construction of Statutes—V. S. 1700, 1735.

The privilege of a nonresident witness from service of *mesne* process by *summons* in a civil case cannot be pleaded in abatement.

General language in a statute should receive a general construction, unless restricted by the context or by plain inferences from the scope and purpose of the act.

Statutes *in pari materia* should be construed together; and when a statute uses words in a certain sense, and a subsequent statute uses them on the same subject, it will be taken to use them in the same sense, nothing to the contrary appearing.

V. S. 1091, providing that when more than one defendant is named in the writ, and service thereof is made upon one of them, and return made of the writ as provided by the statute, if personal service is not made upon another of them by reason of his absence from the state, the clerk may issue a certified copy of the writ, which may be served like the original and with the same effect, applies as well where the absent defendant is a nonresident as where he is a resident of the state.

TRESPASS AND CASE. Heard on motion to dismiss defendant Rosselle's plea in the nature of a plea to the juris-

diction, and on demurrer to her plea in abatement, at the September Term, 1903, Chittenden County, *Tyler, J.*, presiding. Motion to dismiss denied; demurrer overruled; plea in abatement adjudged sufficient, and judgment that the writ abate as to defendant Rosselle, and she recover her costs. The plaintiff excepted. Cause passed to the Supreme Court before hearing on the merits. The opinion fully states the case.

B. E. Bullard, V. A. Bullard, E. A. Heath, and R. E. Brown for the plaintiff.

Where a plea is improperly pleaded, objection must be made by motion to strike out; demurrer is improper. *Pool v. Hill*, 44 Miss. 306; *Copperthwait v. Dummer*, 18 N. J. 258; *Elliot v. Ins. Co.* (N. J.) 3 Atl. 171; *Davis v. Louisville & N. R. Co.*, 108 Ala. 660; *Richmond v. Tallmadge*, 16 Johns. 307; *Trabue v. Higden*, 44 Tenn. 620.

Defendant might have claimed her privilege by seasonably moving the court there sitting to have service vacated. *Washburn v. Phelps*, 24 Vt. 506; *Murray v. Wilcox*, 97 N. W. 1087; Am. Dig. 1902 A. c. 3585, § 17; *Mullen v. Sanborn*, (Md.) 25 L. R. A. 721; *Longuville v. May*, 87 N. W. 432.

Defendant waived her privilege by failing to claim it at the first opportunity. *Sebring v. Stryker*, 30 N. Y. Supp. 1053; *Hendrick v. Gates*, (Pa.) 3 C. B. Rep. 160; *Wood v. Kinsman*, 5 Vt. 588; *Farmer v. Robbins*, 47 How. Pac. 415; *Wilson v. Nettleton*, 12 Ill. 61; *Woods v. Davis*, 34 N. H. 328; *Leal v. Wigram*, 12 Johns. 88; *Petrie v. Fitzgerald*, 1 Daly 401.

W. B. C. Stickney for the defendant Rosselle.

The first plea is a plea to the jurisdiction, and as such is not a dilatory plea. *Pike Bros. v. McMullen*, 66 Vt. 121; *French v. Holt*, 57 Vt. 187.

A motion to dismiss presents no question as to the sufficiency of the plea. *Marsh v. Graves' Admr.*, 68 Vt. 400; *Tracy v. R. R. Co.*, 76 Vt. 313.

ROWELL, C. J. This is trespass and case, returnable before Chittenden County Court. Both defendants are named in the writ, which was personally served on the defendant Brock, and return made, but was not personally served on the defendant Rosselle.

The case was set for trial at the March Term, 1903, when the defendant Rosselle came into court, and on her affidavit that she had come from Indiana to attend the trial as a witness, and had then learned for the first time that she was named in the writ as a defendant, and had never had any notice of the suit by service nor otherwise, was permitted to file a plea, called by her counsel a plea in the nature of a plea to the jurisdiction, the subject-matter of which is, bad service, as she was a non-resident, and not personally served nor her property attached.

Thereupon the clerk, on application of the plaintiff, it being made to appear that said defendant was absent from the State when the writ was served, and that no personal service thereof had been made upon her, issued an order under section 1091 of the Vermont Statutes, that she be notified of the pendency of the suit and to appear therein, by delivering to her a certified copy of the writ and declaration within such a time, which was done, and due return thereof made. The plaintiff then filed what is called therein an answer to said plea, claiming it bad in divers respects in form.

and substance, and moving that it be dismissed, and for judgment against said defendant for costs. Then said defendant pleaded in abatement her privilege from said last-mentioned service as a non-resident witness, and also her non-liability thereto because of such residence; to which the plaintiff demurred.

The defendant says that as said order of service recites and admits as the ground for its issue the very fact on which the first plea is based, namely, want of service on her of the original writ, and as the plaintiff proceeds upon the theory that the infirmity of the original service and its inadequacy to make her a party could be cured by service upon her under the order after she came here as a witness, on the assumption that she was merely an absent defendant under the statute,—no question is here under the first plea, and that its consideration is unnecessary, as all questions that could be made thereunder are before the court in the second plea under the demurrer. The first plea, therefore, is not considered; and in order to dispose of it on the record, it is treated as withdrawn, as the plaintiff cannot be harmed thereby.

As to the second plea, it is considered that the privilege of a non-resident witness from service of mesne process by summons in a civil case, cannot be pleaded in abatement. *Fletcher v. Baxter*, 2 Aik. 224; *Booream v. Wheeler* 12 Vt. 311, decided in 1840. These are cases of arrest on mesne process in civil cases, and in such cases the law was changed by statute in 1849, and now, if a person is privileged from arrest in a civil case, and so informs the officer at the time the arrest is made, he may, if the arrest is on mesne process, plead such facts in abatement. But as this case is not within the statute, the principle of the cases cited governs it, and they are referred to for the ground and reason of the holding.

It is further considered that said plea is bad for that section 1091 includes non-resident defendants as well as resident defendants. It was passed in 1894, and provides that when more than one defendant is named in the writ, and service thereof is made upon one of them, and return made of the writ as provided by the statute, if personal service is not made upon another of them by reason of his absence from the State, the clerk may issue a certified copy of the writ, returnable within twenty-one days from the date of issue, and that the same may be served like the original writ and with the same effect.

The language of this section is general, and broad enough to include non-resident defendants, and the rule is that general language in a statute is to receive a general construction, unless restricted by the context or by plain inferences from the scope and purpose of the act.

But here the context is not restrictive; nor are the inferences from the scope and purpose of the act, but rather the contrary, for as the service provided for is given the same effect as service of the original writ, and as personal service of the original writ on a non-resident defendant in this State is good, the inference is that the statute was intended to include all on whom the original writ could be thus served, and therefore, to include non-resident defendants. And besides, statutes *in pari materia* are to be construed together, and when a statute uses words in a certain sense, and a subsequent statute uses them on the same subject, it will be taken to use them in the same sense, nothing to the contrary appearing. Now section 1641 of the Vermont Statutes, providing for personal notice to an absent defendant, passed in 1878, by express language, uses the words "absent defendant," as meaning a non-resident as well as an absent resident; and as that section and section 1091, subsequently passed, are *in pari materia*, the ab-

sent defendant of the latter must be taken to mean the same as the *absent defendant* of the former, there being nothing to indicate the contrary.

Judgment reversed, demurrer to second plea sustained, said plea adjudged insufficient, and cause remanded.

IN RE GEORGE R. CLARK'S ESTATE.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed June 12, 1906.

Probate Court—Appeal—"Person Interested"—V. S. 2584.

"A person interested," within the meaning of V. S. 2584 allowing an appeal from a decree of the probate court, is one who has some legal right, or is under some legal liability that may be enlarged or diminished by the decree.

An administrator *de bonis non*, who has been directed by the probate court to pay a sum of money to a certain person, is "a person interested" in a decree of the probate court appointing an administrator of the estate of the person to whom said payment is directed to be made but whom the administrator *de bonis non* claims is still alive, so that the administrator *de bonis non* is entitled to an appeal therefrom, under V. S. 2584.

APPEAL FROM A DECREE OF THE PROBATE COURT granting administration on the estate of George R. Clark and appointing an administrator thereof; Arthur G. Whitham, appellant; Lyman W. Redington, the administrator appointed, appellee. Heard on appellee's motion to dismiss the appeal,

at the December Term, 1905, Windsor County, *Miles*, J., presiding. Motion denied. The appellee excepted. The opinion states the case.

Stickney, Sargent & Skeels for the appellee.

The appellant has no right of appeal. He is not "a person interested" in the decree appointing the administrator. *Woodward v. Spear*, 10 Vt. 420; *Hemmenway v. Corey*, 16 Vt. 225.

Charles P. Tarbell and *William Batchelder* for the appellant.

The appellant is so related to the matter in issue that he is liable to suffer pecuniary loss by the appointment of the appellee. This makes him "a person interested," within the meaning of the statute, and entitles him to an appeal. *Green v. Blackwell*, 32 N. J. Eq. 768; *In Re McKenner*, 23 La. 369.

A living person cannot be concluded by a decision of the probate court that he is dead. As to him such a decree is absolutely void. *Stevenson v. Superior Court etc.*, 62 Cal. 60; *Jochumsen v. Bank*, 3 Allen 87; *Thomas v. People*, 107 Ill. 517; *State v. Richmond*, 26 N. H. 239.

ROWELL, C. J. This is an appeal from a decree of the probate court for the district of Hartford, granting administration on said estate and appointing an administrator thereof. The statute is that "a person interested" in a decree of the probate court "who considers himself injured thereby," may appeal therefrom. The question is whether the appellant has such an interest in said decree that he can appeal therefrom. His interest is, that as administrator *de bonis* with the will

annexed of the estate of Silas H. Clark, grandfather of the said George R. Clark, he has in his hands a large amount in money and securities, decreed by the probate court to be paid and delivered by him to the said George as his distributive share of the said Silas's estate.

The record of the probate court shows that the decree appealed from was made on the 8th day of February, 1905, at the verbal request of the heirs of the estate of the said George, late of Waddington, in the county of St. Lawrence and State of New York, deceased intestate, leaving estate in the district of Hartford. The appellant states in his application for an appeal that by diligent inquiry he has not been able to find the said George, to pay to him his said distributive share, and that he believes he was seen alive in 1901 by divers persons named, at divers times and places named, and in 1902 in the State of Montana by another person named; that by diligent search and inquiry he is unable to learn that the said George has since died; that if he is yet alive, the appellant would have no adequate means of protecting his own interest nor that of his sureties on his administration bond if he should turn over the funds and securities in his hands to the administrator of the estate of the said George; and therefore he prays for an appeal, that the question whether the said George is dead or not may be more fully tried and determined.

The case not coming within the statute for settling the estates of persons absent and unheard from for fifteen years, but standing on the general law authorizing probate courts to settle the estates of deceased persons, if it should turn out that the said George was alive at the time administration was granted on his estate and an administrator appointed, then that grant and appointment would be absolutely null and void from the beginning for all purposes whatsoever, because the pro-

bate court would be without jurisdiction of the subject-matter, and the whole proceeding without due process of law. This is authoritatively settled by *Scott v. McNeal*, 154 U. S. 34, commented upon and explained in *Cummins v. Reading School District*, 198 U. S., page 472 and following.

This being so, it follows that if the appellant should pay the money and deliver the securities in his hands to this administrator, it would be no protection to him against the supposed intestate should he appear and assert his rights. And if he is dead, but died since the grant of this administration, such payment and delivery would be no protection against an administrator appointed since his death.

If this administrator should sue the appellant for the money and the securities, the appellant could deny the plaintiff's representative capacity. *Aldis v. Burdick*, 8 Vt. 21; *Perrin v. Granger*, 33 Vt. 101, 106; 2 Redf. on Wills, 107, pl. 5; *Wales v. Willard*, 2 Mass. 120, and cases commented upon in *Jochumsen v. Suffolk Savings Bank*, 3 Allen, page 90 and following.

It would seem, therefore, that he need not wait till he is sued, by which time his evidence may be dissipated, but that he may raise the question *in limine* by appealing from the appointment, for "a person interested" in a decree, within the meaning of the statute, is one who has some legal right, or is under some legal liability, that may be enlarged or diminished by the decree. This is shown by *Woodward v. Spear*, 10 Vt. 420, and *Hemmenway v. Clark*, 16 Vt. 225, where the appellants had no such interest, but claimed adversely to the estates. But here the appellant has such an interest and does not claim adversely to the estate, but only questions whether there is an estate, that he may properly protect the funds in

his hands, and save himself, if he can, from a twofold enlargement of his liability in respect of them.

Affirmed and remanded.

THOMAS MANN v. BRIDGET HALEY.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and MILES, JJ.

Opinion filed July 6, 1906.

*Debt on Judgment—Settlement—Validity—Consideration—
Deceit—Attorney's Lien.*

During the pendency of an action of debt on judgment wherein plaintiff sought to hold an insurance company as the trustee of the defendant on a matured life insurance policy in which defendant was named as beneficiary, the defendant's attorney, without the knowledge of the plaintiff's attorney, settled with the plaintiff, who later claimed that the settlement was obtained by the false and fraudulent representation that the plaintiff could get nothing by a contest, as the trustee could not be held. The only evidence as to liability of the trustee was that of the said attorney, who testified that the trustee was an Illinois corporation, and the policy an Illinois contract, but that the insured's application therefor was made in this State. *Held*, that there was nothing in this to show that the said statement made to the plaintiff was false.

Since the liability of the trustee could be honestly questioned, and was the matter in dispute, the disposition of that question afforded a sufficient consideration for the settlement of the suit, though for a sum of money less than the judgment debt.

Since the record does not show that the plaintiff's attorneys had an unpaid bill against their client, their claim that they had a lien on said judgment for their services and disbursements in procuring

it, and that said settlement could not be made in disregard of their rights, is not considered.

DEBT ON JUDGMENT. Plea, accord and satisfaction. Trial by court in the City Court of the city of Burlington, Mower, Judge. Judgment for the defendant. The plaintiff excepted. The judgment declared upon was for \$105.46, and defendant's liability thereon was undisputed. The suit was settled for \$95.00. It appeared that the plaintiff's attorneys in this case were his attorneys in the original suit in which the judgment declared upon was rendered, and that defendant's attorney knew this when he made the settlement.

Powell & Powell for the plaintiff.

The judgment declared upon is a liquidated claim. The mere part payment of a liquidated claim is an insufficient consideration to support an accord and satisfaction. *Keeler v. Salisbury*, 33 N. Y. 653; *Harrison v. Henderson*, 100 Am. St. Rep. 429; *Webber v. Couch*, 134 Mass. 26; *Leeson v. Anderson* (Mich.) 41 Am. St. Rep. 597; *Rose v. Hall* (Conn.) 68 Am. Dec. 402; *Bailey v. Day*, 26 Me. 88; *Wheeler v. Wheeler*, 11 Vt. 66; *McDaniels v. Lapham*, 21 Vt. 234; *Goodwin & Co. v. Follett*, 25 Vt. 389; *Walan v. Kerby*, 99 Mass. 3; *Twitchell v. Shaw* (Mass.) 57 Am. Dec. 81; *Conn. River Lbr. Co. v. Brown*, 68 Vt. 239.

This cannot be considered a compromise, because a compromise is based upon a disputed claim. *Harrison v. Harrison*, 100 Am. St. Rep. 394. And it is not a release, because not under seal. *Buck v. Kittle's Est.*, 49 Vt. 291.

Powell & Powell had a valid attorney's lien on the judgment declared upon. *Hooper v. Welch*, 43 Vt. 171; *Weed v. Boutelle*, 56 Vt. 581.

R. E. Brown and J. E. Cushman for the defendant.

The alleged false representations of defendant's attorney were mere statements as to his opinion of the law involved in the case, and afford no ground for the rescission of the contract. 14 Am. & Eng. Enc. 54; *Upton v. Tribilcock*, 91 U. S. 45; *Abbott v. Treat*, 78 Me. 121.

Plaintiff's attorneys had no lien on the judgment. *Hooper v. Welch*, 43 Vt. 170; *Weed v. Boutelle*, 56 Vt. 578; *Parker v. Parker*, 71 Vt. 392.

MUNSON, J. The suit was brought in 1905 upon a judgment obtained in 1902, and was tried on a plea of accord and satisfaction. The Catholic Order of Foresters, in which the life of defendant's son had been insured for defendant's benefit, was summoned as trustee. The settlement with plaintiff was effected by defendant's attorney without the knowledge of plaintiff's attorney, and plaintiff claims that it was obtained by false and fraudulent representations. The representation made was that the plaintiff could get nothing by a contest, as the trustee could not be held. The only evidence touching the liability of the trustee was that of the attorney who made the representation, who testified that the trustee was an Illinois company and the contract an Illinois contract, but that the application was made in this State. There is nothing in this to show that the statement made to the plaintiff was false.

Plaintiff contends further that the settlement was invalid for want of consideration. It is argued that the judgment was a liquidated and incontestible demand, and that there could be no binding settlement of it for less than the full amount. But the right to hold the trustee was the matter in dispute, and

that was a claim that could be honestly questioned, and the circumstances were such that the disposition of it afforded a consideration for the settlement made. The matter was in suit, and an adverse judgment on the trustee process would have subjected the plaintiff to the payment of costs already incurred, and a contest would have increased the costs involved. An unquestioned judgment may be satisfied by a payment of less than its amount, in the settlement of a disputed matter collateral to the judgment.

Plaintiff's attorneys also claim that they had a lien on the judgment for their services and disbursements, and that a settlement could not be made in disregard of their rights. It is not necessary to consider the legal aspect of this claim. It is assumed in argument that the attorneys had an unpaid bill against their client, but there is nothing in the case to show that they did have.

Judgment affirmed.

STATE v. FRED ACKERLY.

May Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed July 6, 1906.

Bigamy—Defence—Respondent's Honest and Reasonable Belief—V. S. 5059.

A person who, having a wife living, marries another woman, in circumstances not within any exception of V. S. 5059, which creates

the crime of bigamy, is guilty of that crime, although at the time of his second marriage he honestly believed, upon reasonable grounds, that his wife was dead.

INFORMATION for bigamy. Plea, guilty. Trial by court upon an agreed statement of facts at the March Term, 1906, Washington County, *Rowell, J.*, presiding. Judgment, guilty; and sentence thereon. The respondent excepted.

The agreed statement is signed by the respondent and the State's Attorney, and states that the respondent, "In his own proper person, at the present term, hereby waives the right to a trial by jury, and asks that his case be tried upon the following statement of facts: On the seventh day of October, 1896, the said Fred Ackerly was duly joined in marriage in the state of New Jersey to one Ertika Kolmany, both persons being competent to contract said marriage; that the said respondent lived with the said Ertika Kolmany as his wife until the fall of 1898, in said state of New Jersey, when they separated and he enlisted with the United States Army for service in the Philippine Islands, that while in the Philippine Islands in the year of 1901 he received a communication from a friend in New Jersey, where he left his wife, stating that his said wife was dead; that in 1903 he returned to this country and went to Canada and became a member of the militia of Canada and resided there until about January, 1905; that at the Town of Barre in the county of Washington and State of Vermont on the ninth day of January, 1905, the said Fred Ackerly was duly joined in marriage with one Annie D. Smith, the said Annie D. Smith, a single woman, and competent to contract marriage. That his first wife was living at the time of said marriage to the said Annie D. Smith and is still living; that from the time the said respondent left his first wife in New Jersey in 1898, down to and including the time of his

second marriage, he had not known of the existence of his first wife and supposed her to be dead, according to the information conveyed as aforesaid, that his first wife was never in the state of Vermont, and was, therefore, out of the state for more than seven years together prior to the said second marriage; that at the time of the said second marriage the respondent did not know his first wife to be living from the time he left the state of New Jersey, in 1898, down to and including the time of said marriage."

John W. Gordon for the respondent.

Hollister S. Jackson, State's Attorney, for the State.

MUNSON, J. The charge is bigamy, and the facts are agreed upon. The statute creating the offence provides that it shall not extend to "a person whose husband or wife has been continually beyond the seas or out of the state for seven years together, the party marrying again not knowing the other to be living within that time." V. S. 5059. The case presented does not bring the respondent within the exception. It is urged, however, that the statute ought not to be construed to include cases where there is an honest belief in the death of the husband or wife, entertained upon reasonable grounds. This claim is not based upon anything contained in the statute, but on the general proposition that an intention to penalize an act that results from an ignorance of fact not due to negligence, ought not to be presumed.

There are many statutes in every jurisdiction that make the doing of certain acts criminal, without words bearing upon the knowledge or intent of the doer; and in prosecutions under statutes of this character it is ordinarily held that ignorance of the fact which makes the act criminal is not a defence. See

12 Cyc. 148, 157, 158. This rule has been applied in a great variety of cases, from breaches of police regulations to bigamy, adultery and statutory rape. See note to *Farrell v. State*, 30 Am. Rep. 617. It is held, however, in some jurisdictions, that an honest belief, based upon reasonable grounds, is a defence to the charge of bigamy, although the second marriage was within the statutory period. 4 Ency. Law, 2 ed. 40. But the weight of authority in this country is the other way. The question has not been passed upon in this State, but the action of the Court has at least been foreshadowed in cases recently decided. *State v. Hopkins*, 56 Vt. 250 (260); *State v. Wyman*, 59 Vt. 527; *State v. Dana*, 59 Vt. 614; *State v. Tomasi*, 67 Vt. 312; *State v. Ward*, 75 Vt. 438. It was claimed in *State v. Tomasi* that ignorance of fact, unaccompanied by negligence, exempts from criminal responsibility. But it was said in that case, and said again in the *Ward* case, that when a statute makes an act penal, without reference to knowledge, ignorance of the fact is no defence. No ground occurs to us upon which it can be urged that those cases should be distinguished from this.

It is clearly the intent of the statute that one who marries within the seven years shall do so at his peril. There is nothing in the harshness of the provision that justifies a doubt of this intention. The consequences of an invalid marriage to society and to innocent parties are so serious that the law may well take measures calculated to insure the procurement of the most positive evidences of death before the contracting of another marriage in less than the time fixed.

Judgment that there is no error, and that the respondent take nothing by his exceptions.

SARAH M. GREEN v. ALFRED DODGE.

May Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, and MILES, JJ.

Opinion filed July 10, 1906.

Landlord and Tenant—Assumpsit for Rent—Dispute as to Agreed Rental—Evidence—Bill of Exceptions—Referring to Record of Trial—Effect—Statute of Limitations—Burden of Proof—Payment on Account—Instructions—Court Mistaken.

In assumpsit for rent, it appearing that the annual rental agreed upon was in dispute, it was proper to allow plaintiff to show the fair rental value of the premises during the term of the lease, as bearing upon the probable agreed rental.

Where the record of the trial is referred to by the bill of exceptions for a full statement in respect of a particular exception, it must have been deemed necessary for that record to be before this Court, and, if not furnished, such exception will not be considered.

In assumpsit for rent of a farm, defendant having testified that the farm was rented to his wife, and not to him, it was proper to allow plaintiff to show by a witness, who heard a part of a conversation between defendant and plaintiff's daughter about giving a note for the rent, that the witness did not then hear defendant claim that the farm had been leased to his wife.

Plaintiff's witness, after testifying to what was said and done on several occasions when she saw defendant, was allowed, subject to defendant's exception, to testify that on none of those occasions when the witness talked with him, or was present when plaintiff was talking with him, did defendant claim that the farm was leased to his wife. *Held* that, as neither the subject-matter of the conversations, nor what was said on the different occasions, is shown by the exceptions, it cannot be said that the evidence was not properly received.

Evidence that plaintiff's agent had some talk with defendant about the use of a wagon in respect of which there was no controversy, with-

out revealing what the talk was, though immaterial and irrelevant, could not have harmed defendant.

In assumpsit for rent of a farm, it appearing that plaintiff claimed that the agreed annual rental was \$125, but that defendant claimed it was \$100, it was proper to allow plaintiff's daughter to testify that whenever she asked defendant for the rent he never claimed that the agreed annual rental was \$100.

In assumpsit for rent of a farm, it appearing that defendant claimed that by the contract he was to have from the farm fire-wood enough for the use of his family, and sought to be allowed an offset because of not having had the agreed amount, it was proper to allow plaintiff, who claimed this to be a fictitious defence, to show by her daughter that on none of the occasions when the witness talked with defendant about the rent did he make any claim that he had not had fire-wood enough.

Since the record does not show that an exception was saved to the admission of certain evidence complained of, it is not considered.

A witness produced by plaintiff, and whose evidence in direct examination tended to impeach defendant by showing his general reputation for veracity, testified in cross-examination that when he spoke in direct examination of defendant's general reputation "in certain respects," he referred to his reputation "in respect to finances,"—that he was a man who did not meet his financial obligations as promptly as men in general,—“I mean that his reputation is in making these debts,—promises to pay more than he knows he can.” Thereupon defendant offered to show by said witness that there were no instances where defendant had not paid dollar for dollar in the course of time for debts he had contracted. *Held*, that this offer was properly excluded; and that defendant's motion to strike out the witness's direct testimony, as far as it was offered as impeaching evidence, was properly denied.

In assumpsit for rent of a farm, the defendant testified that the farm was rented to his wife. The court, in charging the jury said: “We recall no evidence, that is, we recall no evidence of any conversation that was had in regard to it, that is inconsistent with the fact of the contract being made with the husband; but the whole thing is a matter for you, considering what was said, the subsequent conduct of the parties, all that happened in regard to it, to say who was the real party to the contract.” *Held* that, in view of the whole charge, even though the court overlooked some evidence, was mistaken, there was no error.

The delivery by defendant to plaintiff of a bushel of potatoes on an account upon which the Statute of Limitations had run, renewed the account.

Where the defendant pleads the Statute of Limitations, he assumes the burden of establishing that defence.

GENERAL ASSUMPSIT for rent of a farm. Pleas, the general issue, payment, Statute of Limitations, and offset. Trial by jury, at the March Term, 1905, Washington County, *Munson*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The defendant's sixth exception is stated as follows: "Mrs. Walker was improved as a witness by the plaintiff. She testified to what was done and said on several occasions when she saw Mr. Dodge. The plaintiff's attorney asked her the following question:

Q. Now on any of these occasions when you saw Mr. Dodge and talked with him, or when you were present when your mother was talking with him, did he make any claim that the farm was leased to his wife? A. No, sir.

This question and answer were admitted subject to objection and exception by the defendant."

All the information given by the bill of exceptions about the bushel of potatoes is: "It appeared that the claim of the plaintiff was barred by the Statute of Limitations, unless there had been a payment of one bushel of potatoes within six years before the commencement of this action. The plaintiff's evidence tended to show that she with her daughter went to the defendant's on only one occasion when the defendant was at home and procured a bushel of potatoes, that she claimed was applied as a payment. The defendant's evidence tended to show that no such payment by way of a bushel of potatoes was ever made and that the only time when the plaintiff and her

daughter came to his house was during the absence of the defendant and his wife."

John W. Gordon and L. P. Lamson for the defendant.

J. H. Lucia and H. C. Shurtleff for the plaintiff.

WATSON, J. The exceptions taken are numbered, and those upon which reliance was placed in argument will be referred to by number.

Exception 3. The plaintiff claimed that a written lease was executed specifying rent at one hundred twenty-five dollars a year, and introduced in evidence what she claimed to be a copy of it. Regarding the existence of such a written contract there was a dispute, and the defendant claimed that the annual rent agreed on was one hundred dollars instead of one hundred twenty-five dollars. Before the defendant had introduced any evidence pertaining to the yearly value of the premises, the plaintiff was permitted to show, subject to exception, that during the term of the lease they were fairly worth one hundred twenty-five dollars. The evidence was admissible as showing the probable rent agreed on. 1 Wigmore Ev. § 392; *Kidder v. Smith*, 34 Vt. 294; *Bedell v. Foss*, 50 Vt. 94. In *Bradbury v. Dwight*, 3 Met. 31, where the terms of a lost written contract for the sale of timber were in dispute, the value of the timber by the cord was received to show the probable terms of the contract.

Exception 4. The plaintiff testified that a lease was drawn up and the defendant signed it, but that she had lost it. She did not give any evidence tending to show how she lost it, or that she had made diligent search for it, she simply stated that she had lost it. The copy referred to under exception 3 was then produced by the plaintiff as a copy of the

lost lease. The court found that the original lease had been lost and admitted the copy in evidence, to which defendant excepted on the ground (1) that a proper foundation for secondary evidence had not been laid; (2) that the paper produced did not, under the plaintiff's own testimony, purport to be a copy, because she claims that the original paper was signed by the defendant, while this one is not signed by either party. The record of the trial is referred to for a full statement bearing upon this exception, but it has not been furnished. Manifestly it was deemed necessary for that record to be before this Court to give a fair understanding of the ruling made. Otherwise the record would not thus have been made a part of the bill of exceptions. Since a part of this portion of the case is not before us, the questions there raised are not considered. The same is true regarding exceptions 11 and 14, and they are not considered. *Hathaway v. Goslant*, 77 Vt. 199.

Exceptions 5 and 6. The defendant had testified that the contract renting the farm was made with his wife. The plaintiff testified that it was made with the defendant, and that the payments of rent were made by him, and that he transacted all the business concerning the place with the plaintiff and her daughters. Plaintiff's evidence tended to show that at no time when defendant was transacting this business with her and her daughters, did he make any claim that the contract was not made with him, or that it was made with his wife; that the defendant himself transacted all business connected therewith and never before made any such claims in this respect as he made at the trial. Mrs. Vesta Drown, a daughter of the plaintiff, who claimed to have been present on an occasion referred to in the exceptions when Mrs. Walker, another daughter of the plaintiff, had conversation with the defendant about giving a note for the rent, was used as a witness by the plaintiff. She

claimed to have heard only a part of the conversation. She was asked whether during any of the conversation which she heard, the defendant claimed that the place had been rented to his wife, or made any claim of that kind. Subject to exception, the witness answered that she heard nothing of the kind. On the occasion to which the evidence relates, the matters under consideration pertained to the farm transaction and the giving of a note for rent. This being so, the fact that he then made no claim that his wife had leased the place, was inconsistent with his claim on the trial and admissible as tending to contradict his testimony. *Seward v. Garlin*, 33 Vt. 583.

Mrs. Walker was also called by the plaintiff. After testifying to what was said and done on several occasions when she saw the defendant, she was asked whether on any of those occasions when she talked with him, or was present when the plaintiff was talking with him, he made any claim that the farm was leased to his wife, to which the witness answered that he did not. Neither the subject-matter of the conversations nor what was said on the different occasions to which reference was made, is shown by the exceptions. Hence we cannot say that the evidence was not properly received.

Exception 18. It appeared that the plaintiff left a top carriage or wagon at the leased premises during the occupancy by the defendant and his family, and that the agent of the plaintiff took the nuts off. No claim was made in this case by the defendant because he did not have the use of the wagon. Subject to exception, the plaintiff was permitted to show as a matter of right by way of rebuttal, that the agent had some talk with the defendant about the use of the wagon. It is argued by the defendant's counsel that this evidence was immaterial and irrelevant. Assuming it to be so, merely showing that talk was had between them on that subject without

showing what the talk was could not have been otherwise than harmless.

Exception 19. Without showing the circumstances attending the occasions, the plaintiff was permitted, subject to exception, to ask a witness whether on these occasions (referring to the occasions when the witness, a daughter of the plaintiff, saw the defendant and asked him for rent) he ever made any claim that the rent was to be one hundred dollars a year, and whether he ever made any statement to the witness as to what the rent was to be. Both of these questions were answered in the negative. We understand the latter question to have reference to the same occasions as the former. On those occasions the business of the witness with the defendant pertained to the rent and was of such a nature that had he understood the agreed sum to be different from that claimed by the plaintiff, it would have been natural for him to assert it. Evidence of the fact that he did not do so was properly received. *Coolidge v. Ayers*, 77 Vt. 448.

Exception 20. The defendant claimed that by the contract, he was to have from the place fire-wood enough for his own family use, and he sought to be allowed a setoff by reason of his not having had the agreed amount. The plaintiff contended that this defence was manufactured for the purpose of the trial. She was permitted in rebuttal, subject to exception, to show by her daughter, Mrs. Walker, that on none of the occasions when she talked with the defendant on the subject matter of rent did he make any claim that he had not had fire-wood enough. The witness had previously given a full statement of the conversations had by her with the defendant on those occasions, and no reference to fire-wood was made by either of them. We think it was a circumstance proper for

the jury to consider in deciding whether the defence was a manufactured one or not.

The plaintiff was permitted to show in rebuttal by a daughter of the defendant that she did not know at the time the defendant was on the leased premises that he claimed anything by reason of the defective pump, or insufficient amount of fire-wood, or on account of the damages accruing by laying of water pipes across the leased premises, or on account of the manure, or the breach of warranty as to the amount of hay the place produced. There had been no evidence introduced by the defendant as to what the witness knew about these things. The admission of this evidence has been argued as exception 22, but it does not appear that any exception was saved in connection therewith, and none is considered.

Exception 27. The plaintiff called one Munson as a witness, and inquired of him whether the defendant had a general reputation in his community for truth and veracity, to which the witness answered, "Why, in some respects he has." The witness was then asked whether that reputation for truth and veracity was on a par with men in general in that community. The witness answered "Truth and veracity on any subject?" To this the examining counsel said, "Yes, sir, general reputation for truth and veracity." The witness answered, "I think he has." The witness was then asked whether that reputation was above or below par with men in general. He answered, "In the respect I have referred to, I think it is below." The examining counsel then said, "Well, I mean generally on that subject," and the witness answered, "I would have to say below, if I was—." The witness was then interrupted by counsel.

In cross-examination in response to questions asked by defendant's attorney, the witness testified that when he spoke in

direct examination of defendant's general reputation "in certain respects," he referred to his reputation "in respect to finances,"—that he was a man who did not meet his financial obligations as promptly as men in general,—“I mean that his reputation is in making these debts—promises to pay more than what he knows he can.” Thereupon the defendant offered to show by the same witness that there were no instances where the defendant had not paid dollar for dollar in the course of time for debts he had contracted, and to the exclusion of the evidence, an exception was saved. It is a sufficient answer to this exception, that the examination in chief of the witness, fairly understood, had been confined to the defendant's general reputation and the offer was to show his actual character. Nor was it error to refuse to strike out the testimony of the witness as far as it was offered as impeaching evidence. It cannot be said that the testimony in chief had no tendency to show the general reputation of the defendant for truth and veracity. Consequently the plaintiff was entitled to have it considered by the jury for what it was worth.

Exception 28. The court charged the jury, “There is no claim here on the part of anyone who has testified, as I recollect, to the use of any language in the conducting of these negotiations that directly points to the fact of the contract being made with the wife. * * * We recall no evidence, that is, we recall no evidence of any conversation that was had in regard to it, that is inconsistent with the fact of the contract being made with the husband; but the whole thing is a matter for you, considering what was said, the subsequent conduct of the parties, all that happened in regard to it, to say who was really the party to the contract—what was the real understanding as to who was the party with whom Mrs. Green

was dealing." The defendant excepted to the statement made therein that there was no language testified to inconsistent with the trade being made with the husband. But the statement of the presiding judge in this respect was not in an unmodified form. It is very apparent from the language used that he was particular to give the jury only his memory of the matter, and that they must have so understood it; for the "whole thing" was distinctly left to them to say, "considering what was said, the subsequent conduct of the parties, and all that happened in regard to it." In such circumstances, even though the court overlooked some evidence, was mistaken, it cannot be assigned as error. *Dow v. School District*, 46 Vt. 108.

Exception 29. It was conceded that the account was barred by the Statute of Limitations unless, as the plaintiff claimed by her evidence, a payment was made by way of a bushel of potatoes within the six years' time that renewed the account. With reference thereto the court charged the jury, in part, that whether the claim was barred by the Statute of Limitations depended upon whether the sack of potatoes was delivered as claimed by the plaintiff and her witnesses; that the account was conceded to be barred unless that sack of potatoes was delivered upon it, and if they found "that the potatoes were delivered as claimed, then there is a live claim against this defendant," etc. The defendant excepted to the portion of the charge where the court said if the potatoes were delivered upon the account, as claimed by the plaintiff and her witnesses, it would make the account alive.

It is argued that the mere delivery upon an account does not revive a debt nor amount to a payment that would renew it. If the potatoes were delivered by the defendant to the plaintiff upon her account as she claimed upon her evidence,

then they would constitute a proper item of credit to the defendant on the account, which is equivalent to a payment, and would prevent the operation of the statute. The charge in this respect was therefore without error. *Palmer v. Woodward's Estate*, 61 Vt. 571; *Bates v. Sabin*, 64 Vt. 511; *George v. Vermont Farm Machine Co.*, 65 Vt. 287.

The instruction to the jury that on the question of the Statute of Limitation the burden of proof was with the defendant is in accordance with the settled law of this State, and the exception thereto is also unavailing. *Burnham v. Courser*, 69 Vt. 183.

No other points are made in defendant's brief.

Judgment affirmed.

A. O. PAGE ET AL. v. R. D. McCLURE ET AL.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed July 10, 1906.

Mandamus—Demurrer to Petition—Judicial Notice—Population of Town—Federal Census—Scope of Writ of Mandamus—Board of Civil Authority—Duty to Canvass Ballots.

The Court will take judicial notice of the population of any town in this State, as revealed by the last federal census.

A demurrer to a petition for mandamus to compel the defendants, as members of the board of civil authority in a town, to fully canvass

and count all the ballots cast at an annual town meeting on the question whether that town should issue licenses for the sale of intoxicating liquors, does not admit the allegation of the petition that it was the duty of the defendants, as members of such board of civil authority, to so canvass, count, and declare such ballots; for whether that duty exists is a question of law.

A writ of mandamus can enforce the performance of only existing duties. It can neither create new duties, nor exact of a public officer more than the law requires him to do.

There is no law that makes it the duty of the board of civil authority in a town having not more than four thousand inhabitants, to canvass and count ballots taken on the question whether such town shall issue licenses for the sale of intoxicating liquors.

The fact that the members of the board of civil authority who were present at an annual town meeting in a town having fewer than four thousand inhabitants, assuming that it was their duty to canvass and count the ballots cast at that meeting on the question of whether the town should issue licenses for the sale of intoxicating liquors, proceeded to perform that supposed duty, does not subject them to mandamus to compel the proper performance thereof.

PETITION FOR MANDAMUS to compel the defendants, as members of the Board of Civil Authority of the town of Highgate, to fully canvass and count all the ballots cast at an annual town meeting on the question whether that town should issue licenses for the sale of intoxicating liquors, brought to the Supreme Court for Franklin County at its May Term, 1906, and then heard on demurrer to the petition.

The petition alleged, among other things, that the petitioners, A. O. Page, G. Allen Sargent, M. W. Hedding, A. Oscar Benoit, Tuffield L. Trombley and Horace Cross, were all residents, taxpayers, and legal voters in the town of Highgate, Vermont; that the Board of Civil Authority of said Town consists of three selectmen, seven justices of the peace and the town clerk; that at its annual town meeting in March, 1906, said town voted upon the question whether it would issue li-

censes for the sale of intoxicating liquors, using the official ballots required by law; that at said town meeting there were present two of said selectmen, defendants, William G. Carman and John Dutton, three of said justices of the peace, defendants, Ransom D. McClure, Melvin E. Barr and Hubert G. Carman, and also said town clerk, defendant, Clark R. Lyon; that it was the duty of such members of said Board of Civil Authority as were present at said meeting to canvass and count said ballots; that the defendants as such members of said Board, assumed said duty and proceeded to count said ballots; that in canvassing and counting said ballots, they found and counted without difficulty 117 "Yes" votes, and the same number of "No" votes, but that they found one ballot with a cross in the "Yes" square, and with the word "Yes" written in the "No" square, and that said ballot had the appearance of an attempted erasure of the word "Yes" so written in the "No" square; that, on finding that the vote stood a tie, if said ballot was not counted, a great controversy arose among the parties interested as to how said ballot should be counted; that the Board of Civil Authority, composed of defendants, refused to either count or reject said ballot, and refused to declare the result of the vote, but made the following record of their proceedings, and caused the same to be spread upon the records of said town, as a part of the record of the proceedings of said meeting: "Vote for license as follows: Yes, 117, No, 117 with one vote to be decided by the court, if any one interested see fit to carry it up."

The prayer asked for a writ of mandamus commanding the defendants to fully canvass, count and declare all of said ballots cast at said town meeting.

C. G. Austin & Sons for the relators.

D. W. Steele and Alfred A. Hall for the defendants.

The demurrer admits only such facts as are well pleaded. High's Ex. Remedies, §§ 449, 455; *Edwards v. U. S. ex rel.*, 103 U. S. 471; *People ex rel. v. Supervisors*, 15 Barb. 607; 13 Enc. Pl. & Pr., 685.

The right to the writ of mandamus must be clearly established. *Free Press Association v. Nichols, et al.* 45 Vt. 18; *Sabine v. Rounds*, 50 Vt. 74; *McBane v. People*, 50 Ill. 503; *State ex rel. Brickman v. Wilson*, 45 L. R. A. 777; *Beeman v. Lake County, etc.*, 42 Miss. 237; *Townes v. Nichols*, 73 Me. 515; *Freon v. Carriage Co.*, 42 Ohio St. 30; *Mobile etc. Co. v. People*, 132 Ill. 559; *State ex rel. Faires v. Buhler*, 90 Mo. 560; *People ex rel. Wallace v. Saloman*, 46 Ill. 415; *Draper v. Noteware*, 7 Cal. 276; *Puckett v. White*, 22 Tex. 559; *State ex rel. Myers v. Appleby*, 25 S. C. 100; *Maddox v. Neal*, 45 Ark. 121; *People ex rel. Hurd v. Johnson*, 100 Ill. 537; *People ex rel. Harless v. Hatch*, 33 Ill. 9; *Reg. v. Ray*, 44 U. C. Q. B. 17; *Glasscock v. General Land Office Com.*, 3 Tex. 51; *State ex rel. Brooks v. Napier*, 7 Iowa 425; *Pond v. Parrott*, 42 Conn. 13; *Chisj olm v. McGehee*, 41 Ala. 192; 3 Brickall Dig. 625.

Mandamus may compel action, when an officer has refused to act, but it will not control such action. McCrary Elections, § 416; 13 Enc. Pl. and Pr. 529; Spelling Ex. Relief, §§ 1556, 1559; *Peters v. Warner*, 81 Iowa 335; *Dolton v. State*, 43 Ohio St. 652.

The Board of Civil Authority, having once canvassed and declared the vote, has no power to make a recount. *Rosenthal v. State Board*, 19 L. R. A. 58; *Bowen v. Hixon*, 45 Mo. 340;

State v. Donnewirth, 21 Ohio St. 216; *Clark v. Buchanan*, 2 Minn. 346; *State v. Stewart*, 26 Ohio St. 216.

WATSON, J. Section 2, No. 115, Laws of 1904, provides that a vote shall be taken by ballot at every town meeting to be held on the first Tuesday of March, 1905, and annually thereafter, upon the question, "Shall licenses be granted for the sale of intoxicating liquors in this town?" The section specifies the form of the ballot to be used for that purpose and how it shall be marked by the voter in voting "yes" or "no," as he may desire. No specific provision is made in the Act for the counting of the ballots, nor for declaring the result, hence they are to be done according to the general statutory laws governing such duties. The "Australian ballot system," so called,—No. 1, Laws of 1892,—has no application to any annual or special meeting of any town, city, or village held for the purpose of choosing town, city, or village officers except where the population of said town, city, or village exceeds four thousand in number; nor to any annual or special meeting in any town, city or village whose population exceeds four thousand and does not exceed eight thousand, unless such town, city, or village at its annual meeting or at a special meeting, called for that purpose, shall vote to have them so apply. V. S. 131, Section 30, Laws of 1892, became Section 130 of Vermont Statutes. The latter section was amended by No. 4, Laws of 1902, and on that section thus amended the relators rely. But as regards the ballots within its scope, the law was made no broader than before. Indeed in this respect it is in the same language.

The complaint contains no allegation showing the population of the town of Highgate. Nor was such allegation necessary (*Clement v. Graham*, 78 Vt. 290, 63 Atl. 146), for

the court will take judicial notice that by the last Federal census the town is within the class having population not exceeding four thousand. 4 Wigmore Ev. § 2577.

By V. S. 2996, "The moderator shall be the presiding officer of town meetings, shall decide questions of order and make public declaration of votes passed; and when a vote declared by him is immediately questioned by seven voters present, shall poll the voters or divide the meeting, unless the town has provided some other procedure in such cases."

Sections 2983 and 2984 contain provisions whereby in towns of less than four thousand inhabitants certain officers shall be elected by ballot when required or demanded by a certain number of voters. And when a ballot is had as provided in these sections, then by section 2985, the polls shall be kept open for a specified time, and the votes shall be counted by the members of the board of civil authority present. But neither these nor any other provisions of the statute make it the duty of that board or of the members thereof to canvass and count or declare votes taken on the question of license in towns having not more than four thousand inhabitants. How it may be in towns where the population exceeds that number we do not consider.

A writ of mandamus can enforce the performance of only existing duties. It can neither create new duties nor require of a public officer more than the law has made it his duty to do. *Bailey v. Oriatt*, 46 Vt. 627; *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861.

It appears from the allegations of the complaint that the defendants constitute part of the members of the board of civil authority of the town of Highgate, and were present at the annual town meeting in question. It is alleged that it became and was their duty as said board legally to canvass and

count the ballots cast at that meeting on the question of whether the town should issue licenses, and that they assumed said duties and professed to act as said board in the canvassing and counting of the votes so cast.

Whether it was the duty of the defendants as members of that board to canvass and count such votes is a question of law, consequently the allegation in the complaint in this respect is not admitted by the demurrer.

The official relation of the defendants gave them no power to canvass and count these votes and they have none now. The fact that they assumed the duties and professed to act as such board in so doing, is not enough to subject them to a mandate. In this respect they stood then as now only as private individuals. Mandamus lies to compel a party to do only that which it is his duty to do without it, and to be coerced he must have the power to perform the act. *Brownsville v. Loague*, 129 U. S. 493, 32 L. ed. 780.

Demurrer sustained, complaint adjudged insufficient and dismissed with costs.

JAMES McQUIGGAN v. JOHN LADD, ET AL.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and MILES, JJ.

Opinion filed July 11, 1906.

Assault and Battery—Self-defence—Degree of Force Justifiable—Evidence—Specific Instances—Real Character and Reputed Character—Plaintiff's Financial Condition—Motion for Verdict—Defective Exceptions.

Where in an action for assault and battery, defendant justifies on the ground of self-defence, he assumes the burden of making it affirmatively appear that he used no more force in his defence than reasonably appeared to him in the circumstances, to be necessary for his protection.

The word "character" as applied to a man, has two distinct meanings. It may denote either real character or reputed character.

In the impeaching of a witness by showing his general reputation for veracity, only reputed character is involved, and, hence, only general reputation is admissible to establish it.

But in an action for assault and battery wherein defendant justifies on the ground of self-defence, and claims that his conduct was affected by his knowledge that plaintiff was a quarrelsome and dangerous man, both plaintiff's real character and his reputed character may be involved; and defendant may prove plaintiff's real character in that respect by specific instances of its exhibition, and his like reputed character by general reputation; for defendant's conduct would be as greatly affected by his knowledge of plaintiff's real character, as by his belief in the truth of that general reputation which constituted plaintiff's reputed character.

Nor in such case is it necessary that defendant should have knowledge of each specific instance adduced in evidence of the claimed exhibition of plaintiff's quarrelsome character; it is only necessary that the jury should find that such was in fact plaintiff's real character, and that defendant knew it.

In an action for assault and battery wherein defendant justified on the ground of self-defence and claimed that his conduct was affected

by his knowledge that plaintiff was in the habit of using intoxicating liquors, that when he was intoxicated he was quarrelsome and dangerous, and that at the time of the affray in question he was intoxicated, and plaintiff's evidence tended to show that he never used intoxicating liquors, it was proper to allow defendant to show that on a certain occasion, six years before the affray in question, plaintiff was intoxicated and "appeared wild and cursing and ugly."

In an action for assault and battery it was error to allow defendant's witness to testify that a certain witness produced by plaintiff had stated that he would do everything in his power to ruin defendant's father.

In an action for assault and battery, defendant's witness was allowed to testify that a certain witness produced by the plaintiff and who in cross-examination denied that he said so, told him that a certain other witness produced by the plaintiff, and who had testified that she saw the affray in question, did not in fact see it. *Held* in the circumstances, no error.

Defendants' testimony to the effect merely that they had been cautioned by their parents as to their conduct towards the plaintiff, could not have harmed the plaintiff.

The ruling of the trial court on the question of remoteness of offered evidence is not, ordinarily, revisable in the Supreme Court.

In an action for assault and battery, plaintiff's offer to show that one of defendants threw certain articles out of a sled was properly excluded.

In an action for assault and battery, plaintiff's offer to show merely "his pecuniary condition at the time of the assault and after," was properly excluded.

Where the bill of exceptions states only that "at the end of the defendant's case" plaintiff moved for a verdict against one of the defendants, which motion was denied, subject to plaintiff's exception, but the evidence is not referred to, the exception is not well taken.

The amount of force which a person is justified in using in self-defence, is that force which reasonably appears to him, in the circumstances, to be necessary for his protection; and it is error to instruct the jury that it is such force as he "honestly believes" in the circumstances to be necessary for his protection.

TRESSPASS for assault and battery against John Ladd, Daniel Ladd, and Eugene Spicer. Daniel Ladd's plea, *son as-*

sault demesne. Replication, *de injuria*. Plea of John Ladd and Eugene Spicer, the general issue. Trial by jury at the June Term, 1905, Orange County, Powers, J., presiding. At the close of the plaintiff's evidence the court directed a verdict in favor of Eugene Spicer. Verdict as to the other defendants, not guilty, and judgment thereon. The plaintiff excepted.

Plaintiff's second, third, fifth, seventh, eighth and eleventh exceptions were as follows:

"2. The testimony of Patrick Brown, which tended to show that on a certain occasion, six or seven years before that time, when the plaintiff was arrested and convicted for breach of the peace, that he was under the influence of intoxicating liquors, and appeared wild and was cursing and ugly, was further objected to on the ground of remoteness, and an exception was allowed. It appeared from the defendant's evidence in connection with this that the plaintiff informed the defendant of the trouble he had at that time and on that occasion, and that the plaintiff informed this defendant that he, meaning the plaintiff, 'cleaned out the whole boarding house.' "

"3. The defendants, under the objection and exception of the plaintiff were permitted to show by Mrs. Walter Ladd, mother of the defendants, John and Daniel Ladd, that on several occasions prior to the trouble she had seen the plaintiff under the influence of intoxicating liquor, for the purpose of impeaching, discrediting and contradicting the plaintiff."

"5. The defendants were allowed to show by witness, Frank Ladd, subject to the plaintiff's objection and exception, that witness, Royal Flanders, a witness of the plaintiff, told him, Frank Ladd, that Mrs. McQuiggan didn't know anything and didn't see the trouble. Witness Royal Flanders, on cross-examination, was asked the question if he didn't tell Frank Ladd, that witness, Mrs. McQuiggan, didn't know anything,

and didn't see the trouble, to which question witness answered 'No.' "

"The evidence of the defendant tended to show that Flanders had been somewhat active in looking up evidence for the plaintiff, and testified, as the evidence of the defendant tended to show, to facts and instances somewhat different than what he told Mr. Frank Ladd a short time before, and the question objected to was about a matter which at the time was the subject of conversation."

"7. The defendant was allowed to introduce testimony, subject to the plaintiff's objection and exception, that Mrs. McQuiggan went down to Archie McCormick's one evening, and that she told Mr. McCormick about the intoxicated condition of Mr. McQuiggan, and further that on that occasion she appeared wild and a little mite scared."

"8. The plaintiff offered in rebuttal the following testimony, which was excluded, and the plaintiff was allowed an exception. That while the mules were being hitched up, that one of the boys, either John or Daniel, threw out of the sled an evener with one whiffletree on it, and also a separate whiffletree.

Court.—Do you claim they were implements of war?

Darling.—Don't know anything about that; we shall claim they had the tools.

The court ruled that this testimony was inadmissible to characterize the assault, or to impeach the statement made by a witness for the defence, that there was nothing in the sled body but some blankets in a box used for carrying their dinner."

"11. The plaintiff offered evidence as to his pecuniary condition at the time of the assault and after, and was allowed an exception to the ruling of the court excluding the same."

Harvey, Harvey & Harvey for the plaintiff.

Character cannot be shown by specific instances, and can only be shown by general reputation. *Golden v. Lund*, 50 Neb. 867; *Carlton v. State*, 43 Neb. 374; *Reg v. Rayton*, 10 Cox. C. C. 25; *Pound v. State*, 43 Ga. 88; *Nills v. Curtis*, 158 Mass. 131; *Comm. v. O'Brien*, 119 Mass. 342; *Cornell v. State*, 75 S. W. 513; *State v. Shudwell*, 22 Mont. 559; *Brownell v. People*, 38 Mich. 782; *State v. Meins*, 36 Ore. 315; *Jenkins v. State*, 80 Md. 72; *People v. Druse*, 103 N. Y. 656; *State v. Field*, 14 Me. 244; *State v. Abarr*, 39 Iowa 189; *Comm. v. Hillard*, 2 Gray 294; *Nichols v. People*, 23 Hun. 165; *Dupree v. State*, 33 Ala. 388; *Eggler v. People*, 56 N. Y. 642; *People v. Fundel*, 58 Hun. 482; *Thomas v. People*, 67 N. Y. 218; *Ross v. Lapham*, 14 Mass. 279; *Pratt v. State*, 56 Ind. 179; *Morgan v. State*, 88 Ala. 223; *Harrison v. Harrison*, 43 Vt. 417; *State v. Lull*, 48 Vt. 581.

Courts have universally held that in an action where self-defence is pleaded, while proof of plaintiff's character can be shown, knowledge of such facts must be shown to have been possessed by the party pleading the defence, prior to the time he so defended himself. *State v. Meader*, 47 Vt. 79; *Galbraith v. Flemming*, 60 Mich. 403..

The pecuniary condition of the plaintiff was admissible. *McNemora v. King*, 7 Ill. 432; *Sloane v. Edwards*, 61 Md. 89; *Garther v. Blowers*, 11 Md. 536; *Eltringham v. Earhart*, 67 Miss. 488; *Dailey v. Houston*, 58 Mo. 361; *Heneky v. Smith*, 10 Ore. 335.

The court erred in instructing the jury that the amount of force which defendant should use in defending himself was the amount which he "honestly believed" was necessary

in the circumstances. *Anderson v. U. S.*, 170 U. S. 481; *Price v. State*, 36 Tex. Cr. App. 404; *Addington v. U. S.*, 106 U. S. 185; *Hurd v. People*, 25 Mich. 405; *State v. Keene*, 50 Mo. 357; *Wigmore*, Ev. § 63; *Hughes Instruction to Juries*, § 256; *May v. State*, 6 Tex. App. 191; *State v. Jackson*, 10 S. E. Rep. 769; *State v. Hickam*, 95 Mo. 322; *Davis v. State*, 31 Neb. 240; *Jones v. Bradwell*, 10 S. W. Rep. 745; *State v. Howard*, 143 Kan. 173.

Richard A. Hoar for the defendant.

In cases of this sort it is always proper to prove that the plaintiff was reported to be a quarrelsome man, or that he was in fact such, and that this was known to the defendant at the time of the affray. *Powers v. Beach*, 26 Vt. 529; *Knight v. Smyth*, 57 Vt. 529; *Tenny v. Harvey & Smith*, 63 Vt. 520.

MILES, J. This is an action for an assault and battery, against John Ladd, Daniel Ladd and Eugene Spicer. John Ladd and Eugene Spicer pleaded the general issue. Daniel Ladd pleaded the general issue and also *son assault demesne*, to which last plea the plaintiff replied *de injuria*.

The case was tried by jury and comes to this Court on exceptions to the admission of certain evidence, and to the charge of the court upon the matter of self-defence.

It was claimed on the part of the defendants and their evidence tended to show that what was done on the occasion complained of, was done in self-defence, and that no more force was used by Daniel Ladd, the only defendant who used any actual force upon the plaintiff, than he reasonably believed was necessary under all the circumstances.

The defendants further claimed and their evidence tended to prove that the plaintiff was under the influence of intox-

icating liquor at the time of the alleged assault and battery, which Daniel then detected; that Daniel knew at that time, by reputation and observation, that when the plaintiff was under the influence of intoxicating liquor he was a quarrelsome and dangerous man.

The evidence of the plaintiff, by his wife, Mrs. McQuigan, tended to show that plaintiff was not under the influence of intoxicating liquor at the time of the alleged assault and battery upon him and never used the same, and that she never went to one Archie McCormick's house to have Mr. McCormick come to their house to take care of the plaintiff, because he was under the influence of intoxicating liquor, and was ugly, as the defendants claimed she did.

Under the pleadings and the claims of the parties, the defendants were permitted to show by McCormick, Patrick Brown and Mrs. Walter Ladd, subject to plaintiff's exception, that they had seen the plaintiff, on particular occasions previous to the assault and battery, under the influence of intoxicating liquor, and as to his personal appearance, disposition and actions, as to being cross and ugly, on such occasions.

This evidence was admitted upon the defendant's offer to show that these facts were brought to the knowledge of the defendant, Daniel Ladd, before the date of the alleged assault and battery; and such facts were brought to his knowledge, except two instances of drunkenness and manifestation of ugly disposition on those occasions, one testified to by Mrs. Ladd and the other by Archie McCormick.

The plaintiff further claimed and his evidence tended to prove that the defendant, Daniel Ladd, committed an unprovoked assault and battery upon the plaintiff and thereby seriously injured him.

The defendants further claimed and their evidence tended to prove, that the plaintiff committed the first assault upon Daniel, and that what Daniel did to the plaintiff on that occasion was done in the necessary defence of himself.

The pleadings in this case cast upon the defendants the burden of making it affirmatively appear, that Daniel used no more force upon the plaintiff than reasonably appeared to him, under all the circumstances, to be necessary for his own personal safety. *Harrison v. Harrison*, 43 Vt. 417-424, and cases therein cited. As bearing upon the reasonableness of the force used by Daniel in repelling the claimed assault of the plaintiff, the defendants claimed and gave evidence tending to prove that Daniel knew by observation and reputation at the time of the assault, that the plaintiff, when under the influence of intoxicating liquor, was a quarrelsome and dangerous man, and that on the occasion in question the plaintiff was under the influence of intoxicating liquor which was then detected by Daniel, and that, in consequence thereof, and having in mind what he knew and had heard of the plaintiff's character under such circumstances, he was afraid of him. It therefore became important for the defendant to show that the plaintiff was under the influence of intoxicating liquor at the time of the alleged assault, and that when under the influence of intoxicating liquor he was a quarrelsome and dangerous man, or was reputed to be such, and that the defendant, Daniel Ladd, had knowledge of such facts or report at the time of the alleged assault, and believed them to be true.

The plaintiff's first exception is to the admission of the testimony of Mrs. Ladd, Brown and McCormick, wherein they testify that they had seen the plaintiff on different occasions under the influence of intoxicating liquor, at times previous to

the assault in question, and that on those occasions he was cross and ugly, as stated above.

The plaintiff urges that this was error, because it was an attempt to prove character by specific instances, and he cites numerous authorities outside of this State in support of his contention, and two cases from this State, some of which support his contention and many of which do not. Among those cases which do not support his claim, are the two cases cited from our own State, and these cases illustrate the error into which the profession are liable to fall if distinctions are not carefully observed.

The word "character" has an objective as well as a subjective meaning which are quite distinct. As applied to man, objective character is his actual character; subjective character is such character as he possesses in the minds of others, and is the aggregate or abstract of other persons' opinions of him. *Powers v. Leach*, 26 Vt. 270-278.

In cases of impeachment, where the question of character most frequently arises, the subjective character is the only one involved, for the law is settled, that to create impeachment one must have been so untruthful as to create a reputation in the community where he resides; and hence only general reputation is admissible to establish it; but, in a case like the one at bar, where the actions of a third person are to be affected by a knowledge of another's character, not only may the subjective character be involved, but the objective may be as well; for the action of one, influenced by the character of another, is affected to the same extent by a belief in the truth of general report as it is by a knowledge of the fact, because in either case he believes he knows the fact, and it is that belief which is important. This principle is not new. It was sanctioned in *Harrison v. Harrison*, 43 Vt. 417-424, a case cited by the plaintiff. The

defendant there offered to prove that the plaintiff was reputed to be, and was in fact, a quarrelsome man with a violent and uncontrollable temper, known to the defendant at the time, which was excluded by the court, presumably upon an objection similar to the one raised in this case, and the Court reversed the decision and say: "So if the assailant is known to the assailed to be a practiced pugilist and a man of violence, the kind and degree of resistance must be measured, or at least modified, by the apparent danger with which the party is threatened."

Again in *State v. Lull*, 48 Vt. 581, another case cited by the plaintiff, the respondent offered to show the violent character of one Kefoe, on an occasion before the alleged assault and battery, knowledge of which was brought to the defendant previous to the act complained of, but the court below excluded it on the ground that it was an attempt to prove character by showing specific instances. This Court reversed that decision and held that the evidence was admissible. Judge Pierpoint, in the opinion for the Court, speaks of its coming within the rule that it was proof of character and not particular acts of violence, and the plaintiff in this suit construes that opinion to be a holding in accordance with his contention; but a careful examination of the case shows that the Court intended nothing of the kind. It could not have been proof of general reputation, for the offer was not to that extent, but was clearly an offer to prove character as observed by the witness himself and not character gathered from the aggregate or abstract reports of others. The Court simply meant, that it was proof of objective character and not of specific instances which went to make up general reputation, or subjective character. It certainly would not accord with the reason of any man to say, that it was admissible to show by a witness the characteriza-

tion of a transaction, and not admissible to show to the jury the transaction characterized, that they might judge for themselves whether the act warranted the conclusions of the witness, or to say that a person could witness a transaction, and by characterizing it and stating that characterization to a third party, make that statement evidence, but could not testify to the fact himself.

The admissibility of evidence tending to show objective character or disposition is also sanctioned in *State v. Meader*, 47 Vt. 78-81, wherein the rule laid down in *Harrison v. Harrison*, *supra*, is approved. The defendant in that case offered to show, that the person claimed to have been assaulted was a quarrelsome, fractious man; which was excluded, because the offer was not accompanied by the further offer to show that the defendant had knowledge of that fact, at the time of the alleged assault; and this Court sustained the ruling of the court below; but the opinion clearly indicates that had the offer contained a statement of knowledge on the part of the defendant, the evidence would have been admissible.

To the same effect is the holding in *Knight v. Smyth*, 57 Vt. 529. In that case, which was an action for an assault and battery, the Court held that it was admissible for the defendant to prove that the plaintiff was a domineering, turbulent and quarrelsome woman, and cite approvingly *Harrison v. Harrison*, *supra*; *State v. Meader*, *supra*, and *State v. Lull*, *supra*.

We are not unmindful of the fact that cases can be found outside of this State somewhat in conflict with the views above expressed; but the admissibility of such evidence is so well settled in our own jurisdiction and upon such well grounded reasons, that we do not feel inclined to depart from former holdings of this Court; and we think that the tendency of the

courts is to extend the rule governing the reception of specific instances in the proof of character, upon the idea expressed by Mr. Wigmore in Vol. I, 198, of his excellent work on evidence, wherein he says: "There is no substantial reason against it."

From the foregoing conclusions, it follows, that it was admissible for the defendants to show what was observed as to the character of the plaintiff, as to being cross and ugly when under the influence of intoxicating liquor at a time previous to the alleged assault; and, in order to show that, it was necessary to show that he was under the influence of intoxicating liquor on those occasions; and, as the case tends to show that the defendant, Daniel, knew of those traits of character at the time of the alleged assault and battery, it was not necessary that every occasion observed, which went to make up and establish the existence of those traits of character, should be brought to the knowledge of the defendant in all their details. It was enough that he knew that such traits of character existed, communicated to him by the witnesses who testified respecting them or coming to him from other sources. The evidence objected to was for the jury to say whether such objective character existed as the defendant's evidence tended to show.

The plaintiff's first exception, therefore, was not well taken.

What has been said as to the first exception is equally true of the second. This testimony directly contradicted the plaintiff's evidence, that he never drank intoxicating liquor, and, though the occasion to which the witness testified was several years previous to the date of the alleged assault, it tended to prove the plaintiff's character in this respect at that time, from which the presumption arises that such char-

acter continued until the contrary is shown, or until the date of the alleged assault. The objection that it is too remote is not well taken, and the same was properly received.

What has been said as to the first exception may also be said as to the third exception. That evidence had a tendency to contradict the plaintiff's claim, that he did not drink intoxicating liquor, and was not under its influence at the time of the assault and battery. There was no error in admitting this evidence.

The fourth exception of the plaintiff to the reception of the testimony of Mears, that A. B. Hutchins, a witness produced by the plaintiff, told him that he would do everything in his power to ruin Walter Ladd, father of defendants, John and Daniel Ladd, and of other testimony of Mears showing that witness, Hutchins, was hostile to Walter Ladd, presents a more serious question for consideration. This evidence was offered and received to show a feeling toward the father of the defendants, John and Daniel, and if it was admissible at all, it was because it tended to lessen the force of Hutchins' testimony as against the defendants. If it was admissible, then why are not the feelings of any witness as to the mother, the grandfathers and grandmothers, brothers and sisters, children and grandchildren, and so on *ad infinitum*, as evidence against the other party, broadening the issues out in this respect indefinitely? We have been cited to no authorities either for or against the admission of such evidence, and have been unable to find any. The absence of authority upon this point, while not decisive, has some bearing in determining a question, if it existed, that ought to have come before the court as frequently as the question of feeling of the witness toward one of the parties.

Upon reason and sound policy, we are induced to hold, that the evidence is harmful. The ordinary jury would be liable to treat it the same as if the feeling existed between the witness and the party, and it was reversible error to receive it.

The fifth exception to the testimony of Frank Ladd, that the witness Flanders told him that Mrs. McQuiggan knew nothing and saw nothing of the affray in question, she having testified that she did see it, and the witness, Flanders, having testified to those matters different from what he told the witness, Ladd, was not well taken. For anything that appears in the exceptions, the evidence was properly received as impeaching the testimony of witness, Flanders.

The sixth exception was to the ruling of the court admitting John and Daniel Ladd to testify that, prior to the time of the assault and battery, they had been cautioned by their parents as to their conduct toward the plaintiff. This exception standing alone with no explanation of the grounds of the objection, can furnish no foundation upon which to base error. It may have been, that the evidence was offered in connection with other evidence, that, because of the dangerous character of the plaintiff, which the parents were then discussing, this caution was given, a presumption which may well be made in the absence of anything appearing to the contrary, to uphold the regularity of the action of the court below. If such caution was given in connection with such evidence, it would be admissible upon the question of the amount of force which the defendant, Daniel, reasonably apprehended was necessary for his self-defence. In any view which may be taken of this evidence, it is not apparent to the Court how it could be harmful to the plaintiff.

What has already been said respecting the first exception applies with equal force to the seventh exception. That exception is not well taken.

The plaintiff's offers of evidence, to which his eighth, ninth and tenth exceptions relate, were properly excluded. The evidence offered to which the eighth exception relates, was immaterial and the evidence offered which was excluded subject to the plaintiff's ninth and tenth exceptions, was determined by the court trying the case, to be too remote, and that decision will not be disturbed by this Court. *State v. Doherty*, 72 Vt. 381; *State v. Bean*, 77 Vt. 384.

The plaintiff's eleventh exception is to the exclusion of an offer to show the pecuniary condition of the plaintiff at the time and after the assault. The offer did not inform the court what was expected to be shown. It simply stated the subject-matter concerning which he offered to give evidence. Whether he expected to show himself rich or poor, the offer does not state. The offer was too general, and there was no error in excluding it.

The twelfth exception to the court's overruling the plaintiff's motion for a verdict against Daniel Ladd, made at the close of the defendant's evidence, is not well taken. It was not taken at the close of all the evidence, and all the evidence in the case is not referred to in the bill of exceptions so as to bring that question of fact before this Court, from which it can say whether there was any evidence supporting the defendant's claim that the plaintiff made the first assault and that the defendant used no more force in his defence than was reasonably necessary; besides the exceptions do show that there was evidence tending to prove that defendant's claims are true.

Exception thirteen is to the failure of the court to charge that the specific instances of intoxication testified to must have been known to defendant, Daniel, at the time of the affray. This exception is not well taken, and the reasons are stated in what the Court say to exception one.

The plaintiff's fourteenth exception is to the refusal of the court to charge as requested and to the charge as made upon that point. Without deciding whether there was or was not error in the court's omission to charge in the language of the request, we hold that there was error in the charge as made. The error consisted in the charge respecting the amount of force that defendant, Daniel, was justified in using to protect himself. After the charge had been made and counsel had appeared at the bench and taken exceptions, the court addressed the jury as follows:—"Counsel have called my attention to a statement that I made in referring to the amount of force that Daniel was justified in using to protect himself. I thought I made it clear to you, that it is the amount of force which he honestly believed to be necessary under the circumstances, but, if I did not make that fact clear to you, I now instruct you, that that is the measure of force he was justified in using. His honest belief—his *honest* belief controls."

No authorities have been brought to the attention of the Court wherein it has been held that the amount of force which one might use in self-defence depended upon *honest belief* and we think none can be found. The true rule, as we believe, is that the amount of force which one may justifiably use in self-defence, is such as reasonably appears to him to be necessary under all the circumstances in the case, and whether he is justified in the particular occasion, depends upon whether the jury find that it reasonably appeared to him that it was necessary to use the force which he did use. To rest his justifica-

tion upon the *honest belief* which he entertained at the time, without reference to anything else, would deprive the jury of all considerations, except the simple inquiry of whether the defendant acted *honestly*, and if they found he did so act, the justification would thereby be made out, notwithstanding that the defendant acted in the most absurd and cruel manner. The defendant in such a case would be the sole judge of the amount of force and violence which he might inflict upon one who had first assaulted him, notwithstanding that that assault may have been of the most trivial character.

The rule which we have adopted in this case has the sanction of all or nearly all the cases, not perhaps in the same language, but in substance the same. *Foss v. Smith*, 76 Vt. 113; *Beard v. United States*, 158 U. S. 550; *May v. The State*, 6 Tex. App. 191; *Edwards v. Leavitt*, 46 Vt. 126; *Anderson v. United States*, 170 U. S. 481; *Addington v. United States*, 165 U. S. 185.

As the result of our decision sends the case back to the county court for another trial, we have considered all the exceptions raised on the former trial, notwithstanding that the case could have been disposed of upon the fourteenth alone.

Judgment reversed and cause remanded.

OUGHTNEY JANGRAW ET AL. v. JOSEPH PERKINS.

January Term, 1906. •

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed July 11, 1906.

Mortgage—Foreclosure—Mortgagor Surety for Third Person—Declarations of Principal—Admissibility.

A mortgagor who executed a real estate mortgage conditioned for the performance by a third person of the latter's stated agreement with the mortgagee, stands as surety for such third person; and, in a suit to foreclose said mortgage, where the mortgagor defends on the ground that such third person is not liable on said contract, the latter's declarations tending to prove said contract, are not hearsay, and are admissible against the mortgagor.

APPEAL IN CHANCERY, Washington County. Heard at Chambers, December 11, 1905, on pleadings, master's report, and defendant's exceptions thereto. Decree for the orators. The defendant appealed. The opinion states the case.

Heaton & Thomas for the defendant.

The testimony of Oughtney Jangraw was hearsay, and so inadmissible. *State v. Thibeau*, 30 Vt. 100; *Penniman et al. v. Patchen*, 6 Vt. 325; *Ellis v. Cleveland*, 55 Vt. 358; *Judevine v. Weeks*, 57 Vt. 278; *So. Ex. Co. v. Todd*, 56 Fed. 104; *Bell v. Staache*, 141 Cal. 186; *McCormick Machine Co. v. Cochran*, 64 Mich. 636; *Holman v. Rainsford*, 3 Kan. App. 676; *Nat. etc. Bank v. Miller*, 131 Mich. 564; *Adams v. Elwood*, 176 N. Y. 176; *Ellis v. Baird*, 31 Ind. App. 295.

R. M. Harvey and *E. M. Harvey* for the orators.

MILES, J. This is a bill in chancery to foreclose a mortgage. It came to this Court twice on demurrer to the bill. First in *Jangraw et al. v. Perkins*, 76 Vt. 127. The bill was held insufficient on that occasion and the cause was remanded. The bill was amended and again came to this Court on demurrer to the amended bill, *Jangraw et al. v. Perkins*, 77 Vt. 375. The demurrer to the amended bill was overruled and bill held sufficient. The cause was remanded, the bill answered, issue joined and referred to a master who heard the case and made his report to the court below. Exceptions to the report and to the admission of certain evidence were taken by the defendant and were overruled by the court and the report accepted, from which an appeal was taken to this Court.

The facts alleged in the amended bill, among others not necessary to state, may be briefly summarized as follows: That Mary Jangraw, one of the plaintiffs, being pregnant, instituted bastardy proceedings against one, Revett, upon which proceedings he was arrested; that subsequently he procured bail, acknowledged that he was the father of the child and offered to marry the orator, Mary, and fix up the bastardy proceedings in that way; that the father objected to fixing the bastardy proceedings up as thus proposed, unless Revett gave security for the support of the mother and child, but was willing to arrange it and discontinue the bastardy proceedings upon such security being furnished. It was finally arranged that such security should be given and the marriage consummated; that thereupon the mortgage in question was given, the marriage ceremony performed, and the orators relying upon the mortgage and in consideration thereof discontinued the bastardy proceedings.

The defendant in his answer denied all the allegations in the bill except the giving of the mortgage.

The evidence admitted by the master subject to the defendant's exception, and upon which the defendant relies in his brief, is the testimony of Oughtney Jangraw, who testified in substance that Revett offered to marry the orator, Mary, and admitted that he was the father of her child, but he, Oughtney, could not consent to the marriage of his daughter unless Revett gave him some security, and that Revett said he could get it.

Exceptions were taken by the defendant to the admission of other evidence, but the defendant has not considered them in his brief, and, from what is brought to our attention in those exceptions, we see no error. The only question then, is, was the admission of Jangraw's testimony error.

The ground of objection urged by the defendant is, that it was the declaration of a third party made in the absence of the party sought to be bound by it and was hearsay evidence.

Reverting to the allegations of the bill and the issue joined thereon by the answer and replication, we find it distinctly alleged and denied that the mortgage was given to *secure* the faithful performance of the agreement between Revett and the orators, relative to the marriage of the orator, Mary, her support and that of the child and the discharge of the bastardy proceedings. The master has found upon that issue, that Revett, orators and defendant met at Mr. Senter's office in Montpelier, Nov. 8, 1901, and then and there, in the presence of the defendant, the agreement for the marriage of Mary and support of herself and child and discontinuance of the bastardy proceedings, was made, and the mortgage was given as security for the performance of that agreement. The condition of the mortgage also clearly shows the same. The defendant therefore stood as surety for Revett, who occupied

the position of principal. Now, this relation existing, the declarations of Revett, the principal, were not hearsay. They were the declarations of the party whom the surety represented in making that defence, binding the surety to the same extent as the principal. *Richardson v. Hitchcock*, 28 Vt. 757; *Wilson v. Green*, 25 Vt. 450; *Brown v. Munger*, 16 Vt. 12; *Campbell v. Moulton*, 30 Vt. 667.

The defendant raises no question but that the evidence was material and tended to prove the contract in dispute and in issue under the pleadings; hence having undertaken to defend on the ground that Revett is not liable on the contract claimed by the orators, he stands affected with declarations of Revett to the same extent that Revett would be if he were defending on the same ground. He stands in Revett's shoes in making such defence.

The same question is presented as would have arisen had the mortgage been given to secure the note of Revett, which the defendant attempted to show was paid or otherwise discharged. In such case the rule is well settled that the declaration of the principal binds the surety to the same extent that it would himself. The declaration of Revett that the note was still due and owing and was not paid nor discharged, was under such circumstances admissible. See authorities above cited.

Decree affirmed and remanded.

J. B. H. CUSHMAN v. M. C. DAVIS.

January Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed July 11, 1906.

*Homestead—What is Abandonment—Several Abandonment
by Husband and Wife—Acquisition of New Homestead
—Replication in Chancery—Filed with Master—Effect.*

A husband's sole deed of his homestead is void.

When a homestead ceases to be "used and kept" as such, it ceases to exist, regardless of whether another has been acquired.

A homestead is abandoned by simply removing from the premises, with no intention of either occupying or keeping them as a homestead; and this is as completely effected by the several and independent removal of the husband and wife, each at different times, but each with the requisite intention, as by a like joint and contemporaneous removal.

Where a husband and wife severally and independently removed from their homestead premises, each with no then intention of again living thereon, the homestead thereby ceased to exist, and could not be revived by an unexplained claim of an interest therein, asserted by the wife a long time thereafter.

Error must be affirmatively shown by the record; it will never be presumed.

In a suit in chancery, the filing of the replication with the master to whom the case is referred amounts to nothing, leaves the case standing on bill and answer, and the master should refuse to go to trial; but where, after the replication is filed with such master, a full hearing is had before him, and the chancellor subsequently allows the replication to be filed *nunc pro tunc*, the defect is cured.

APPEAL IN CHANCERY, Washington County. Heard at Chambers, November 21, 1905, on the pleadings, master's report and defendant's exceptions thereto, *Rowell*, Chancellor. Decree for the orator. The defendant appealed.

M. M. Gordon, and *Senter & Senter* for the orators.

Unless there is a dwelling house owned by the house-keeper actually on the place, or one in process of erection and designed for a home, there is no homestead. *Rice v. Rudd*, 57 Vt. 6; *Pease, Admr., v. Sherlock*, 63 Vt. 622; *Bugbee v. Bemis*, 50 Vt. 216; *Thorp v. Thorp*, 70 Vt. 46; *Woodbury v. Warren*, 67 Vt. 251; *Whiteman v. Field*, 53 Vt. 554.

Spaulding and his wife both left the premises, with no intention of ever returning. This constitutes an abandonment. *Howe v. Adams*, 28 Vt. 541; *Davis v. Andrews*, 30 Vt. 678; *Jewett v. Brock*, 32 Vt. 65; *McLeay v. Bixbec*, 36 Vt. 254.

Young & Young for the defendant.

When a homestead right has once attached, it will not be considered abandoned till another has been acquired. *Woodbury v. Luddy*, 14 Allen (96 Mass.) 1; *White v. Clark*, 36 Ill. 285; *Van Bogart v. Van Bogart*, 46 Iowa 359; *Moore v. Dunning*, 29 Ill. (19 Peck) 130; *Taylor v. Hargous*, 4 Cal. 268; *Ott v. Sprague*, 27 Kan. 620; *Dickinson v. McLane*, 57 N. H. 31; *Poole v. Gerrard*, 6 Cal. 71.

If the separate deeds of the husband and wife will not convey the homestead, how can the separate acts of each, or the separate oral declarations of each, render the sole deed of either effectual to convey the homestead? *Lyons v. Andry*, 106 La. 356; *Woodward v. Till*, 1 Mich. N. P. 210; *Kelley v. Duffy*, 31 Ohio St. 437; *Herron v. Knapp*, 72 Wis. 553; *Castlebury v. Maynard*, 95 N. C. 281; *Conway v. Elgin*, 38 Minn. 469; *Sherrid v. Southwick*, 43 Mich. 517; *Meador v. Place*, 43 N. H. 307; *Roshold v. Mehus*, N. D., 23 L. R. A. 239; *Chambers v. Cox*, 23 Kan. 393; *Bruner v. Bateman*, 66 Iowa 488; *Belden v. Younger*, 76 Iowa 568; *Lunt v. Nealey*, 67 Iowa 97; *Cogswell v. Warrington*, 66 Iowa 666.

MILES, J. This is a bill in chancery to remove a cloud from the alleged title of the orator to certain real estate in Charleston, Vt., which he claims to own by virtue of a series of conveyances beginning with a quitclaim deed from George C. Spaulding to L. W. Stevens, bearing date April 15, 1904.

The alleged cloud is a quitclaim deed of the same real estate from Spaulding and his wife, Ellen M. Spaulding, to the defendant, bearing date December 3, 1904.

The bill was answered, but no replication was filed or made in the case within the rule, nor before the parties met for hearing before the master. At the commencement of that hearing the orator asked leave of the master to file a replication with him; which was granted subject to defendant's exception, and after the same was filed a full hearing was had, with evidence produced by both parties, and upon that evidence the master made his report to the court of chancery, returning therewith the replication.

To all evidence received by the master on the issue joined by filing such replication, to the master's report and to evidence excluded by the master, the defendant seasonably objected and was allowed an exception.

The master found, among other things, that the real estate in question became the property of Spaulding on June 4, 1900, and that he married Ellen M., June 17, 1900, from which last named date they lived on the real estate in question, upon which there was then a house and barn, until July 6, 1901, when George C. left his wife and the premises with no intention of again returning to live thereon and never thereafter did return to and live upon the same; that the wife continued to live there until June, 1903, when the dwelling house upon the premises was burned; that thereupon the

wife moved to Canada taking with her the household goods belonging to her and George C. and leaving the premises with no intention of again returning to or living upon them and she never since has lived upon them; that the consideration for the deed from George C. and Ellen M. to the defendant was twenty-five dollars paid to Ellen M. and five dollars to George C.; that since George C. and Ellen M. left the premises neither have acquired any other homestead, and have lived apart ever since, both being poor and practically without means with which to purchase or create any other homestead; that the wife, at one time, was aided as a pauper by the town of Charleston, for which aid a suit was brought by that town against George C., to recover for such aid and the premises were attached upon the writ in that suit; that such suit was finally settled without resort to the sale of the premises; that at the time the defendant took the deed from George C. and Ellen M., on December 3, 1904, he had full knowledge of the deed from George C. to L. W. Stevens, and of the several intervening conveyances down to and including the conveyance to the orator and that Ellen M. claimed an interest in the premises at the time she joined in the deed to the defendant.

Upon the foregoing facts, the defendant claims that George C. and Ellen M. had a homestead in the premises at the time of the conveyance to L. W. Stevens and until they gave the quitclaim deed to the defendant, December 3, 1904; and that the quitclaim deed to L. W. Stevens on April 15, 1904, without the wife's joining therein, was absolutely void and that therefore the orator, who rests his claim upon that deed, has no title to such premises, but that the deed to the defendant from George C. and wife invested him with the full title and that therefore it is not a cloud upon the orator's

title, but is the title itself. Without inquiring as to whether such deed from George C. and Ellen M. to the defendant is or is not a cloud upon the title of the orator, but considering that matter as the parties themselves have treated it, viz.: that if invalid, it is a cloud, we proceed to consider, as the first and principal question, whether the orator's title is or is not valid.

If the real estate in question was the homestead of George C. at the time he conveyed it by quitclaim deed to L. W. Stevens, *Martin and Wife v. Harrington*, 73 Vt. 193, is full authority for holding, that such deed was void and conveyed no title to L. W. Stevens, the wife then being alive and not having joined in the deed, and it is therefore unnecessary to consider the many authorities contained in the defendant's brief upon that point, taken from other jurisdictions.

The question then is, was the real estate in issue, the homestead of George C. at the time he quitclaimed the same to Stevens, April 15, 1904? No serious question is made but that it was the homestead of George C. and wife until the house was burned in June, 1903; but the orator contends that, under the facts found by the master, that homestead was abandoned when the wife moved to Canada, taking with her all her household furniture, with no intention of returning to and again living upon the premises, never having returned to and lived upon them since that time, and George C. having left the premises long before the wife, with no intention of again making his home there and having never since changed that intention nor lived thereon nor with his wife. On the other hand, the defendant urges, that such homestead was not abandoned on account of such acts of George C. and wife, because they have acquired no other homestead since; because they could not abandon the homestead by any separate act of their

own, and because the wife did not voluntarily leave the premises, but was forced by circumstances to do so, and because she claimed an interest therein at the time she joined in the deed to the defendant, December 3, 1904.

Under the defendant's contention that the homestead was not abandoned, because George C. and Ellen M. had acquired no other before the conveyance to L. W. Stevens, he cites *Woodbury v. Luddy*, 14 Allen 1 (96 Mass.). That decision rests entirely upon a construction of the Massachusetts statute, which then provided that no release or waiver of the homestead exemption should be valid unless by deed for good consideration, acknowledged and recorded as in cases of conveyances of real estate, and that no new right of homestead should be acquired until a previous one had been discharged or released by deed, with the consent of the wife therein. That case we hardly think can govern in the case at bar; for it rests entirely upon the construction of a statute to which we have nothing similar. No other case is cited upon defendant's brief supporting his contention upon this point, unless it is the case of *White v. Clark*, 36 Ill. 285. Upon an examination of this case, it will be observed that it is nowhere stated that the homestead cannot be abandoned until another is acquired; but, if the case did so hold, it could hardly be said to be authority in this State, as the statute is substantially the same in Illinois as in Massachusetts, and not like any statute in this State.

It is unnecessary, however, for us to resort to other jurisdictions for authorities upon this point; for we think this Court has abundantly settled all questions in this respect. Our present homestead law was passed in 1849. Sections one and five of No. 20 of the Acts of that year, are the same in legal effect as sections 2179 and 2189 V. S., except, that

at the time of the passage of that act, the law required the homestead to be "occupied" by the head of the family, instead of "used or kept" as now required, in order to constitute the homestead right, section one of said act corresponding to section 2179, V. S., and relating to attachments of the homestead, and section five corresponding to section 2189, V. S., and relating to conveyances of the homestead. The first case construing these sections, or either of them, is *True v. Morrill*, 28 Vt. 672. In that case the Court held, that there was no homestead, because the head of the family or housekeeper did not "*occupy*" the premises then in dispute; thereby holding that occupancy was a necessary element in the existence of the homestead; from which it must follow, that when the homestead ceases to be occupied, it ceases to exist, whether another has been acquired or not.

Again later, a case came up under the homestead statute respecting the husband's sole deed of what was once his homestead, but which he had leased for a period of five years, *Davis v. Andrews*, 30 Vt. 678, and the Court say, Poland, Judge, delivering the opinion: "One of the requisites of a homestead by the statute is, that it shall be occupied by such person as a homestead."

It is said in *Mills v. Grant*, 36 Vt. 269: "The statute definition of a homestead necessarily implies a home actually used or occupied by the housekeeper as a dwelling place or home for himself and his family."

The foregoing decisions were made under the Act before the amendment; but this Court has held since the amendment that the homestead should be actually "*used or kept*" as such, as uniformly as it held that it should be actually "*occupied*" as a homestead, in order for it to exist as such, before the amendment. The only difference which the Court has made

between the law as it was before the amendment and as it is since the amendment is, that in one case it was necessary to the existence of the right of homestead that the premises be actually "occupied" as such; while in the other it is necessary that they be actually "used or kept" as such. *Bank v. Gale*, 42 Vt. 27; *Whiteman v. Field*, 53 Vt. 554; *Russ v. Henry*, 58 Vt. 388; *Keyes v. Bump*, 59 Vt. 391; *Heaton v. Sawyer*, 60 Vt. 495; *Woodbury v. Warren*, 67 Vt. 251; *Rice v. Rudd*, 57 Vt. 6. All these cases construe the statute so as to make it the essential feature of the homestead act, as it now stands, that the premises must be "*used or kept*" as such, and that when they are not so "*used or kept*," they cease to be a homestead, whether another has been acquired or not. The language of the statute is not equivocal. It is plain and from the first has received a uniform construction inconsistent with the idea that it could not be abandoned without the acquisition of another. As a piece of evidence bearing upon the intent of the homesteader in the abandonment of the homestead, the acquisition of another place of residence may be useful, but further than this it has no importance in this State.

Upon the point that George C. and Ellen M. could not abandon the homestead by any separate act of their own, the defendant relies upon *Ott v. Sprague*, 27 Kansas, 620; *Dickinson v. McLane*, 57 N. H. 31; *Poole v. Gerrard*, 6 Cal. 71 (65 Am. Dec. 481). These cases, relating to conveyances and not to the subject of abandonment, may express the law as to the effect of separate conveyances by husband and wife in the states where rendered, and probably do, but they can have little, if any, weight in this State, as we have no statute exactly corresponding to the statute under which those decisions were made. If, however, our statute did confine the conveyance of the homestead to the joint deed of the husband

and wife, executed at the same time, which we do not decide, the question of *abandonment* must still remain. It is probably true, that, if the same and no different principles are involved in the conveyance of the homestead than are involved in a simple abandonment of the homestead without deed or writing, then, possibly a decision respecting a *conveyance* might be authority for an *abandonment*; but the principles governing each are not the same. A *conveyance* transfers the title to the real estate as well as the homestead right, while an *abandonment* of the homestead in no way affects the title, but simply changes the character of such real estate. The conveyance of real estate in most, if not all the states, is controlled by statute, and must be executed and effected in the manner pointed out by the statute creating the right; while the abandonment is effected by simply removing from the premises with no intention of either occupying or keeping them as a homestead. The former, to be effectual, requires a strict compliance with the express provisions of the statute; while the latter only requires the removal and requisite intention. Intention under the statute of this State largely determines whether the real estate is kept or used as a homestead. *Thorp v. Wilbur*, 71 Vt. 266; *Thorp v. Thorp*, 70 Vt. 46; *Whiteman v. Field*, 53 Vt. 554. In some of the states, the statute may be such as to wholly preclude the possibility of abandonment of the homestead, except by writing or deed; but where a statute exists giving the right to convey and release the homestead, but not precluding the possibility of abandonment, as in this State, the two methods of divesting the husband and wife of the homestead right stand independent, each resting upon its own peculiar requisites.

As above stated, the defendant does not and could not dispute but that the right exists in this State of conveying

and also abandoning the homestead. It therefore follows, that decisions respecting the two distinct methods, having very little, if anything, in common, are of very little aid in determining questions arising respecting the other, and that, it is perfectly consistent to hold in one that the acts of the husband and wife must be simultaneous in the conveyance of the homestead, where the statute so requires, and yet that they may abandon by separate acts.

The defendant urges, that, if the homestead can be abandoned without another having been acquired and by separate acts of the husband and wife, yet in this case it was not abandoned by the wife, as she left the place because forced to do so by circumstances over which she had no control, and because she claimed an interest in the premises at the time she joined in the deed with her husband.

An answer to the defendant's contention upon this point is, that the master has found that the husband and wife left the premises with no intention of again returning to live upon them, and it makes no difference that they left at different times. Whether this be called an abandonment or otherwise, it was an act coupled with an intention, which, under the statute, prevented the husband and wife, or either of them, from saying that the real estate in question was "*used or kept*," as a homestead, and though the husband still continued to own the land, its character as a homestead ceased to exist, and could not be revived by an unexplained claim of interest asserted by the wife a long time after the abandonment of the possession of the premises. The removal from the possession of the premises in question by both husband and wife, as in this case, with no intention of again returning to or living upon them, was sufficient, under the statute, to terminate the existence of the homestead interest; for it could not

then be said that they were "*used or kept*" as a homestead; and such facts being found in the report, it becomes unnecessary to consider or decide what the result would have been if the master had found that the wife continued to claim a homestead in the premises after the house had burned, and intended, from the date of the fire to the time she joined in the deed to the defendant, to return to and live upon the same.

The result of the foregoing discussion is that on the 15th day of April, 1904, the real estate in question was not the homestead of George C. and Ellen M., and that the sole deed of the said George C. conveyed the premises to L. W. Stevens, and that through the subsequent conveyances from Stevens and his grantees that title came to and is now in the orator, and that the deed from George C. and Ellen M. to defendant, conveyed no title to the defendant, and that therefore said last named deed is a cloud upon the orator's title.

As to the defendant's contention that it was error for the chancellor to allow the replication to be filed *nunc pro tunc*, we take occasion to say, that the filing of the replication with the master to whom the case was referred, was of no avail, and left the case standing on bill and answer. The case standing thus, the master should have refused to go to trial; but a hearing was had and leave subsequently obtained from the chancellor to file a replication *nunc pro tunc*. This was within the discretion of the Chancellor. Chancery Rule 45. When such leave was granted and a replication filed in accordance therewith, the previous defect was thereby cured.

The defendant contends that the chancellor erred in overruling defendant's exception to the master's ruling admitting evidence tending to show the acts, conduct or declarations of George C., Ellen M., the orator or the defendant, had or

made subsequent to the execution of the deed from George C. to L. W. Stevens, dated April 15, 1904.

It nowhere appears in the record before us nor is it pointed out in the defendant's brief wherein the error complained of lies; nor wherein the defendant is harmed by the admission of such evidence. This Court, therefore, cannot assume that it was of a character to produce error; for error is to be shown by the party claiming it, and is never to be presumed. *McNeish v. Hullless Oats Co.*, 57 Vt. 316; *Brooks v. Guyer*, 67 Vt. 669.

Decree affirmed and remanded.

GROUT BROTHERS v. O. R. MOULTON.

May Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, and POWERS, JJ.

Opinion filed August 2, 1906.

Assumpsit—Goods Sold and Delivered—Evidence—Written Contract—Whether Dispositive or Evidentiary—Oral Testimony of Intention—When Permissible—Principal and Agent—Proof of Agency—Sufficiency—Representations of Agent—Breach of Agency Contract—Error not Cured by Charge—Exceptions on Specified Ground—Effect.

Defendant's cross-examination of plaintiff's witness as to the contents of a written contract was harmless, where it revealed only the witness's inability to remember anything about the contents.

In assumpsit for the price of an automobile sold and delivered as part of a written contract whereby plaintiffs gave defendant the exclusive agency for the sale of their automobiles in certain counties, defendant claiming an offset by way of damages caused by plaintiffs' alleged breach of said contract by a written bilateral contract, not offered in evidence, between plaintiffs and third parties, assigning to the latter the exclusive agency of one of said counties, it was not error, as against plaintiffs' objection to the effect only that it was immaterial what said bilateral contract was, to receive in evidence a certain other bilateral contract signed only by plaintiffs, but which, in connection with the testimony of defendant's witness, tended to prove the contents of said first-mentioned bilateral contract.

The admission of a certain letter written by plaintiffs to defendant's witness, and which he received from them together with said bilateral contract signed only by them, if error, was harmless.

The mere fact that plaintiffs, during the life of their said contract of agency with defendant, by a contract with third parties, assigned to them the exclusive agency of a part of defendant's territory, was a breach by plaintiffs of their contract with defendants; and it was material to show what that contract was, regardless of the fact that nothing was ever done under it; that objection goes to the damages, not to the right.

In assumpsit for the price of a steam automobile sold and delivered as part of a contract whereby defendant became plaintiffs' agent for the sale of their automobiles, and which defendant purchased as a demonstrating machine whereby to sell other of plaintiffs' machines, and claimed that plaintiffs represented that it was equipped with a fusible plug, it was proper to allow defendant's witness to testify that in the summer of said purchase, the public demanded fusible plugs in steam automobiles, and to allow another of defendant's witnesses to testify that, shortly after said purchase, one of the plaintiffs explained to him the necessity and utility of fusible plugs in steam automobiles.

Evidence examined and *held* that a certain person who, as defendant's evidence tended to prove, made false representations to him as to the equipment and style of the automobile in question at the time he purchased it, was the agent of plaintiffs, and was acting within the scope of his agency when he made said representations.

To make a seller responsible for false representations made by his agent in respect of the subject-matter of the sale, it is not neces-

sary that they should have been simultaneous with the conclusion of the contract, but only that they should have been made during the negotiations that led to the contract, have influenced the buyer in making it, and entered into it as a part thereof.

Direct oral statements of intention in respect of the subject-matter of a contract are admissible in evidence only when the language used is equally applicable in all its parts to more than one external object.

In *assumpsit* for the price of an automobile sold and delivered under a written contract which required payment of the car on delivery and "satisfactory demonstration," although plaintiffs proved what "demonstration" means as understood in the trade, it was error to allow defendant, as tending to show what the parties understood it to mean as used in the contract, to prove direct oral statements of one of plaintiffs, made at the time the contract was executed.

The writing in question examined and *held*, that said oral statements were not admissible on the ground that the writing is not dispositive, but only evidentiary; for it is dispositive.

Error in the admission of evidence cannot be cured by instructing the jury to disregard it.

Where evidence complained of was received on re-examination, and nothing appears to show but that it was made admissible by the cross-examination, no error is shown.

Where a party excepts, on a specified ground, to the submission of a certain question to the jury, he will be confined to that ground in the Supreme Court.

Evidence examined and *held* that it tended to show that plaintiffs' agent represented to defendant that the car sold him was a 1903 model.

In *assumpsit* to recover the price of an automobile sold and delivered, wherein one issue was whether defendant had accepted the machine, and defendant claimed damage by way of recoupment, and also to recover a large sum under his declaration in offset, and one item of \$11.25 in his specifications in offset was admitted and the jury instructed to allow it, either in recoupment or offset, and the jury returned only a general verdict for defendant to recover his costs, the case shows by necessary inference that the jury found that defendant had accepted the machine; therefore, if it was error to submit that question, it was harmless to plaintiffs.

GENERAL ASSUMPSIT for the price of an automobile sold and delivered. Pleas, the general issue, declaration in offset, consisting of the common money counts, a count to recover commissions on certain sales of automobiles made by plaintiffs in defendant's territory, a count to recover damages for the alleged failure of plaintiffs to equip said automobile with a fusible plug and steam air pump, and for failure to properly demonstrate same. Replications, *similiter*, and general issue to the declaration in offset. Trial by jury at the September Term, 1905, Orleans County, *Munson*, J., presiding. Verdict for defendant to recover his costs. The plaintiffs excepted. Plaintiffs also moved to set aside the verdict for want of evidence to sustain it. Motion denied, to which plaintiffs excepted.

It appeared that in March, 1903, the plaintiffs, residents of Orange, Massachusetts, were manufacturers and dealers in steam automobiles, under the firm name of Grout Brothers, and that at that time an automobile show was held at Boston, Massachusetts.

The defendant's evidence tended to show that he then lived in Derby, Vt., and was a dealer in sewing machines, pianos, organs, and horses, that he attended said show to learn about automobiles and to take the agency for some automobile adapted to his section of the country if he could make satisfactory arrangements; that while at said show he examined several different makes of automobiles on exhibition there; that the plaintiffs had no automobiles on exhibition at the show but had an office and automobile repository in Boston where their automobiles were on exhibition, and had agents, with automobiles, running back and forth from said repository to said show soliciting customers; that on March 19, 1903, one of plaintiffs' said agents had one of their automobiles

in the street close to the sidewalk in front of the building where said show was carried on; that while the defendant was examining said automobile he was approached by one Walker, who was a person other than the one in control of said automobile, and who the defendant claimed the evidence tended to show was then the agent of the plaintiffs, but which claim was denied by the plaintiffs; that on being asked by said Walker if he was interested in automobiles and thinking of buying, the defendant informed him that he was thinking about taking the agency for some machine if he could arrange for something that was right, in the right way; that thereupon said Walker explained and enlarged upon the merits of Grout automobiles, told the defendant the commission allowed agents, and produced and delivered to defendant a catalogue then issued to the public by the plaintiffs in advertising their said automobile business; that said Walker then and there explained to the defendant the use and necessity of a fusible plug as an equipment of a steam automobile, and represented to the defendant that all Grout Automobiles were equipped with such fusible plug, and that the steam air pump of plaintiffs' machines was a better system than the Stanley system of generating air; that the defendant was then and there in conversation with said Walker concerning Grout automobiles for about an hour and a half; that at his hotel that evening, after the theater, the defendant in company with a friend who had accompanied him on said trip, studied various automobile catalogues, including said catalogue, and at that time read the following printed matter in said catalogue: "Our generator contains fusible plug, and cannot burn out." That on the morning of March 20, 1903, before defendant and his friend had breakfasted, said Walker met them at their hotel, and after sitting with them at breakfast took them to plaintiffs'

said repository, and then and there introduced defendant to plaintiff, Charles B. Grout, that said Charles B. Grout showed the defendant, and the defendant examined, several of plaintiffs' automobiles in said repository, and among others one of a model called Dos a Dos, which is the automobile in question; that the defendant was informed by said Grout that, in order to secure the agency of their automobiles, he must purchase one of their machines for the purpose of demonstration; that the defendant then purchased one of plaintiffs' automobiles which was the above mentioned Dos a Dos, as a part of a contract whereby he then took the agency of the Grout automobiles for the counties of Franklin, Orleans, Lamoille, Caledonia and Essex, in the State of Vermont, that the following contract was then made and executed by the parties:

I, O. R. Moulton, West Derby, Vt., party of the second part, do hereby agree to conform with the following, in consideration of accepting the agency for GROUT AUTOMOBILES, delivered to me by Grout Brothers, Orange, Mass., party of the first part.

In consideration of the following territory, (namely) Franklin, Orleans, Lamoille, Caledonia, Essex, I agree to purchase one automobile, advertise and dispose of same to the best of my ability, and it is my honest and sincere belief that I will dispose of four before the close of the current year, ending January 1, 1904.

Furthermore, I do hereby agree not to accept the agency of or sell other STEAM AUTOMOBILES than manufactured by the parties above mentioned until this contract shall have become void.

All in consideration of which Grout Brothers, party of the first part, agree to allow me the exclusive agency for sale of their goods in the above named territory.

Furthermore, Grout Brothers agree to fully protect O. R. Moulton, party of the second part, and that they will not dispose of, or accept sale for their goods in the following territory, i. e., Franklin, Orleans, Lamoille, Caledonia, Essex, unless all goods manufactured by them shall be ordered by, or through, or commissions allowed on such sales, to O. R. Moulton, party of the second part and that they will furnish him with all printed matter, catalogues, cuts, posters, etc., as he may deem advisable, free of charge.

This contract to be void January 1, 1904.

.....party of second part.

.....party of first part.

Sworn before me this day of 1903.

.....Notary Public.

One Dos a Dos at \$775, less 20 percent—\$620, cash to be paid on delivery of car if satisfactory demonstration, and if four more are bought 25 per cent is to be allowed on the five. All goods to be delivered at or in said territory."

O. R. MOULTON.

GROUT BROTHERS.

Said contract was made upon a printed form, the requisite blank spaces being filled in with a pen, except that the last paragraph, following the word "Notary Public," was wholly written.

The defendant's evidence further tended to show that about the time the contract was completed he asked Charles B. Grout if he guaranteed every proposition in said catalogue, and Mr. Grout replied that he would guarantee every state-

ment in said catalogue except the statement on page 3 thereof: "economy of working about one-half cent per mile;" which should read one and one-half cent per mile.

The plaintiffs claimed, and their evidence tended to prove that the defendant thoroughly examined the automobile in question before he purchased the same, and that it then contained no fusible plug or steam air pump, and that they delivered said automobile to the defendant according to the contract, with all the attachments which were sold with it, that they demonstrated said automobile according to contract, and were ready and willing to demonstrate it further and to instruct the defendant further in its use, if he so desired, but that they were prevented from so doing by the defendant.

It appeared that defendant had paid the freight on the automobile, which amounted to \$11.25, when he took it from the station in March, 1903, and that plaintiffs had never repaid him this sum. It was conceded that this sum, \$11.25, should be allowed defendant in offset or recoupment, and the court so instructed the jury.

The defendant claimed, and claimed that his evidence tended to show, that he was fraudulently led to believe that the automobile in question was a new style of car of 1903 make, and that he would not have bought it, if he had known that it was not a style of that year. The defendant further claimed and his evidence tended to prove that the automobile was not what he purchased and that it lacked a fusible plug and steam air pump; that the automobile was not demonstrated to his satisfaction; that the plaintiffs had sold one or more automobiles in territory assigned to him in the contract of agency hereinbefore set forth; and that he was entitled to the commission on said automobile or automobiles; that at

the time he attended said automobile show he knew very little about automobiles or their construction and operation; that at the time he bought the automobile in question and took said agency he told plaintiff Charles B. Grout that he knew nothing of automobiles except what he had been told; that said Grout knew that defendant was purchasing said automobile for demonstrating purposes wherewith to sell other automobiles; that defendant would not have purchased said automobile if he had known that it was not an up-to-date model of the year 1903; that he was not told by the plaintiffs or their agents that it was a model of 1902.

Defendant's evidence also tended to prove that about the middle of April, 1903, one Joseph St. Jock of St. Johnsbury, Vt., and one E. J. Blodgett of Lyndonville, Vt., visited the plaintiffs' factory at Orange, Mass.; that while at said factory a written contract was made between the plaintiffs of the one part and said St. Jock and Blodgett of the other part, whereby plaintiffs gave said St. Jock and Blodgett the exclusive agency of the County of Caledonia in the State of Vermont during one year from that time for the sale of the automobiles manufactured by the plaintiffs; that then and there said St. Jock and Blodgett bought three automobiles under their said contract of agency, and were to pay for the same when they got home if they proved satisfactory; that one of said automobiles was at the price of \$1,200, and one at \$862, both of these to be at a discount of 20 per cent, and one was a second hand car at the price of \$500, without any discount; that the said prices without discount were the regular price to customers, and that said discount was the reduction made to said St. Jock and Blodgett as agents, in accordance with their said contract of agency; that said automobiles were taken from Orange to St. Johnsbury by three of plaintiffs' agents; that said \$1,200

car and said second hand car proved unsatisfactory and were taken back to Orange by plaintiffs' said agents, that said \$862 car was kept and paid for; that said St. Jock and Blodgett never did anything further under their said contract of agency, but that said St. Jock sold a few Stanley automobiles thereafter during the summer of 1903; that during the summer of 1903, the public did demand fusible plugs in steam automobiles.

The material part of plaintiffs' letter of April 8, 1903, referred to in the opinion, is as follows: "About the agency, we have decided to place Caledonia in your hands and enclose contracts for you to sign. They are not very binding and simply give us a list of our agents and the territory that they wish to cover."

E. J. Blodgett was produced as a witness by the defendant. In his direct examination he was permitted to testify subject to plaintiffs' objection and exception, that at the time he and St. Jock were at plaintiffs' factory in Orange, in April, 1903, as aforesaid, he was told that the fusible plugs were to save the boilers from getting burned in case the water got low, that they were putting them on the boilers to their cars, and that they were on the cars that said St. Jock and Blodgett had bought.

Though blank verdicts, under defendant's declaration in offset, were prepared and given to the jury, they returned only a general verdict for the defendant to recover his costs.

Frank D. Thompson for plaintiffs.

The admission of the testimony of defendant's witness, Blodgett, as to what plaintiffs told him about the necessity and use of a fusible plug, was error. This was *res inter alios*.

Jones v. Est. of Ellis, 68 Vt. 544; *Aiken v. Kennison*, 58 Vt. 665; *Pictorial League v. Nelson*, 69 Vt. 162; *Dover v. Winchester*, 70 Vt. 418; *Phelps, Dodge & Co. v. Conant*, 30 Vt. 277.

Agency cannot be proved by the agent's act or declarations. *Dickerman v. Fire Ins. Co.*, 67 Vt. 609; *Sias v. Consolidated Lighting Co.*, 73 Vt. 35; 1 Greenl. Ev., § 114, note; *Fifer v. Clearfield etc. Co.*, (Md.) 62 Atl. 1122; *Bond v. Pontiac etc. Co.*, 62 Mich. 643.

The question of agency is a preliminary one for the court to determine.

The declarations of an agent are not admissible against his principal, unless they are a part of the *res gestae*. *Barber's Admr. v. Bennett*, 62 Vt. 50; 1 Am. & Eng. Enc. (2nd Ed.) 691; *Mason v. Gray*, 36 Vt. 308; *Underwood v. Hart*, 23 Vt. 120; *Dorne v. Southwork etc. Co.*, 11 Cush. 205; *Baltimore v. Lobe*, 90 Md. 310; *Leeds v. Alexandria etc. Co.*, 2 Wheat. 380; *Grafton Bank v. Woodward*, 5 N. H. 301; 1 Phillips, Ev. 507-516.

To affect the sale, fraudulent representations as to the subject-matter must be made by the seller, or his agent, to the buyer, pending the sale, knowing their falsity, for the purpose of inducing the buyer to purchase, and relied upon by the latter. *Shanks v. Whitney*, 66 Vt. 405; *Hobart v. Young*, 63 Vt. 363; *James v. Hodsden*, 47 Vt. 127; *Cabot v. Christie*, 42 Vt. 121; *Bond v. Clark*, 35 Vt. 577; 14 Am. & Eng. Enc. (2nd Ed.) 102.

Parol evidence of intention of the parties in their use of the term "satisfactory demonstration" in the written contract, was inadmissible. *Daggett v. Johnson*, 49 Vt. 345; *Bradley v. Bently*, 8 Vt. 243; *Conner v. Carpenter*, 28 Vt.

237; *Morse v. Lowe*, 44 Vt. 561; *Stewards v. Town*, 49 Vt. 29; *Benedict v. Cox*, 52 Vt. 247.

This error could not be cured by directing the jury to disregard the evidence. *Hall v. Jones*, 55 Vt. 297; *State v. Meader*, 54 Vt. 126; *Sterling v. Sterling*, 41 Vt. 80; *State v. Hopkins*, 50 Vt. 316.

Defendant, as matter of law, accepted the automobile, and it was error to submit that question. If, after discovering the fraud, the purchaser continues to use the article and to treat it as his own, he is precluded from a subsequent rescission. *Ward v. Marvin*, 78 Vt. 141; *Barrett v. Tyler*, 76 Vt. 108; *Downer v. Smith*, 32 Vt. 1; *Brown v. Nelson*, 66 Vt. 600; *Dennis v. Stoughton*, 55 Vt. 371; 24 Am. & Eng. Enc. (2nd Ed.) 1090.

Where the purchaser has full opportunity to examine the article sold, he cannot claim that he was deceived by the seller's false representations. *Slaughter v. Gerson*, 13 Wall. 379; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Brown v. Leach*, 107 Mass. 364; *Holst v. Stewart*, 161 Mass. 516; *Mamlock v. Fairbanks*, 46 Wis. 415.

Damages by way of recoupment, must arise from the contract upon which plaintiff stands. Anticipated profits, prevented by plaintiff's breach of the contract are not within the rule. *Davenport v. Hubbard*, 46 Vt. 200; *Hadley v. Baxendale*, 9 Exch. 341; 8 Am. & Eng. Enc. (2nd Ed.) 624; *Howard v. Stilwell etc. Co.*, 139 U. S. 199; *Morey v. King*, 49 Vt. 304; *Weeks v. Prescott*, 53 Vt. 73; *Noble v. Hand*, 163 Mass. 289; *Bartow v. Erie R. Co.*, (N. J.) 62 Atl. 489; *Stern v. Rosenheim*, 67 Md. 503; *Barnard v. Poor*, 21 Pick. 378; *Union Pac. Ry. Co. v. Goodbridge*, 149 U. S. 680; *Brigham v. Carlisle*, 78 Ala. 243; *Griffin v. Colver*, 16 N. Y. 489; *Barnstein v. Meech*, 130 N. Y. 354; *U. S. v. Behan*, 110

U. S. 338; *Beck v. West*, 87 Ala. 213; *Howe Machine Co. v. Bryson*, 44 Iowa 159; *Lanahan v. Heaver*, 79 Md. 413; *Acme Cycle Co. v. Clark*, 157 Ind. 271; *Witherbee v. Meyer*, 155 N. Y. 446; *Pittsburgh Gauge Co. v. Ashton Valve Co.*, 184 Pa. St. 36; *Squires v. W. U. Tel. Co.*, 98 Mass. 232.

J. W. Redmond for the defendant.

Agency may be proved by circumstances. 3 Elliot Ev. § 1635; *Isbell v. Brinkman*, 70 Ind. 118; *Columbus, etc. R. Co. v. Powell*, 40 Ind. 37; *Indiana, etc. Co. v. Admanson*, 114 Ind. 282; *Barnett v. Gluting*, 3 Ind. App. 415; *Wright v. Solomon*, 19 Cal. 64; *Strimfler v. Roberts*, 18 Pa. St. 283; *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

The contract in question is evidentiary merely. It was not intended to recite the whole contract. In that case parol evidence of the omitted portion is admissible. *Dunnett & Slack v. Gibson*, 78 Vt. 439; *Winn v. Chamberlin*, 32 Vt. 318.

"It is fraud for a man to tell part of the truth in regard to what he is inquired of, and keep back another part which he knows, if disclosed will prevent the party's dealing with him." *Chamberlin v. Fuller*, 59 Vt. 247; *Graham v. Stiles*, 38 Vt. 557; *Mallory v. Leach*, 35 Vt. 156.

ROWELL, C. J. Assumpsit for the price of an automobile sold and delivered as part of a written contract of agency between the parties for the sale of the plaintiff's automobiles by the defendant in the northeastern counties of this State.

The cross-examination of the plaintiff's witness, Karl Grout, as to the contents of the written contract of agency between them and St. Jock & Blodgett, was harmless, as it elicited nothing but the inability of the witness to remember anything about its contents.

The plaintiff's letter of April 8, 1903, if immaterial, appears not to be such as to prejudice them on the question of damages, as claimed, and therefore its admission was not reversible error. Nor was it error to admit the bilateral contract executed by the plaintiffs only, that accompanied that letter, for taken in connection with St. Jock's testimony, it tended to show the contents of said contract between the plaintiffs and St. Jock and Blodgett; and it was material to show what that contract was, as is shown below.

No exception was taken to the admission of secondary evidence of the contents of said last-mentioned contract, but only to the admission of any evidence of its contents, because it was claimed to be immaterial what that contract was, as it appeared that nothing was ever done under it. But that contract became effective between the parties, and was a breach by the plaintiffs of their contract with the defendant here in question, as it assigned a part of the defendant's territory to St. Jock and Blodgett. Hence it was material to show what that contract was, and it is no answer to say that nothing was ever done under it; that objection goes to the damages, not to the right.

The exception for immateriality to allowing St. Jock to testify that in the summer of 1903 the public demanded fusible plugs in steam automobiles, cannot be sustained. The evidence bore upon the value of the automobile in question, especially for demonstrating purposes wherewith to sell others, for which purpose the defendant bought it, as the plaintiffs knew.

So what the plaintiffs told Blodgett at their factory in April, 1903, about the use and purpose of fusible plugs, was evidence against them of their utility and need.

The testimony on the part of the defendant as to what transpired at the plaintiffs' repository in Boston on the 20th of

March, especially when taken with what took place between the defendant and Walker the day before at the automobile show, tended to prove that Walker was the plaintiffs' agent. That testimony was in substance this: The morning of the 20th, Walker went early to the defendant's hotel, and took him and his friend Moore to the repository, and there introduced the defendant to Charles B. Grout, one of the plaintiffs, as a man from Vermont looking for an agency for automobiles. Grout being busy, Walker showed the defendant and Moore a number of Grout machines in the repository, called attention to their nice finish and style, their strength of build, and said they were well adapted to the defendant's section of country. Then the defendant and Moore were taken by some one to ride in one of the cars; and on their return, said plaintiff asked the defendant how he liked the appearance of their cars, and he said, "from what your representative [meaning Walker] has told us, and what I have seen, I think you have some very good cars." The plaintiff said he thought they had, and pointed out their strength, and said they were better adapted to hilly country than any others, "and seemed to know about the agency business," and "started right in to talk about it." Then the plaintiff, the defendant, and Walker went aside to where the cars were, and talked together a while, and then the plaintiff and the defendant, and perhaps Walker, went into the office, and the contract in question was drawn up and executed. Then Moore, talking with the plaintiff, referred to Walker, either as agent or by name, as having done well in bringing the defendant to plaintiffs' place, and said he thought considerable credit was due to him for it. The said plaintiff himself testified that he knew Walker as a curb broker, but never talked with him till the week of the show, and in their Boston office it might have been, for he was hanging around

there a good deal. He could not remember what was said, except that Walker asked for catalogues, etc.; that he did most of his business with Ham, who ran the office. Neither Ham nor Walker testified. This disposes of all the exceptions based upon the claim of no evidence to prove Walker's agency.

It is said, however, that if Walker was plaintiffs' agent, there is no evidence that his statements were within the scope of his authority. But the testimony that tended to show his agency, also tended to show that his statements were within its scope. And those statements were a part of the *res*, as they related to the very contract here in question. It is not necessary that they should have been simultaneous with the conclusion of the contract, but only that they should have been made during the negotiations that led to the contract, have influenced the defendant in making it, and entered into it as a part thereof; all which the testimony tended to show. *Hobart v. Young*, 63 Vt. 363, 369.

The contract in question required payment for the car on delivery and "satisfactory demonstration." The plaintiffs proved what "demonstration" means as understood in the trade. Then the defendant, as tending to show what the parties understood it to mean as used in the contract, proved, under exception, the direct oral statements of one of the plaintiffs, made at the time the contract was executed, to the effect that if the defendant had prospective customers when they sent a man to teach him how to run the car, they would show it up to them, and if he had some prospective customers up in his section, they would help him sell to them; all which, the defendant claimed, the plaintiffs had neglected and refused to do.

The admission of these statements was error, unless the defendant's claims to the contrary, or some of them, are sus-

tainable; for direct oral statements of intention in respect of the subject of a written contract are admissible only when the language used is equivocal, that is, when it is equally applicable in all its parts to more than one external object. 4 Wig. Ev. §§ 2471, 2472; Thayer's Prelim. Treat. Ev., 444; Steph. Dig. Ev., Chase's ed., 230, (7), 231, (8).

Here the words, "satisfactory demonstration," though their trade meaning may be uncertain on their face, are not shown by extrinsic evidence to be equivocal, and therefore the case is not within the exception to the rule that you cannot enlarge a written contract by oral evidence. *Hart v. Hammett*, 18 Vt. 127, illustrates that exception. There the contract was for the sale of "winter strained lamp oil." It was proved that these words as generally used in the oil trade applied indifferently to winter strained *sperm* lamp oil and to winter strained *whale* lamp oil, and that *sperm* oil was better than *whale* oil, which was the oil delivered. In this state of the case, oral evidence was held to be admissible to show that at the time of the execution of the contract the defendant showed to the plaintiff a sample of the oil to be delivered, and told him it was not *sperm* oil. *New England Granite Works v. Bailey*, 69 Vt. 257, is a similar case. There the contract was for a monument of "white Westerly granite." The monument erected was of a reddish or chocolate cast. It was found that there are different varieties of Westerly granite known to the trade as *white* Westerly granite; some of which has a reddish or chocolate tinge when polished or hammered, and some, a grayish-white tinge. It was held permissible for the defendant to show that at the time the contract was made it was orally agreed by the parties that the latter variety should be used.

St. Martin v. Thrasher, 40 Vt. 460, is an illustration of the rule itself. There a written contract for dressing stone for a tunnel at so much a foot provided that "all of the face of the work that shows is to be measured, and none else." The plaintiff gave oral evidence that the words, "face of the work," meant all the cut and dressed surface that showed, whether horizontal or perpendicular; and the defendant gave like evidence that they meant only the perpendicular fronts of the wall. Held, that the defendant could not show what was said between the parties in their oral negotiations before the execution of the contract as to how the measurement should be made and what face measurement meant. *McKeough's Est. v. McKeough*, 69 Vt. 41, is to the same effect. There the question was whether the whole or only a part of the testator's premises on the west side of a certain street passed by a devise of his "home place on which I now live." It was held to be a question of construction only, and not of intention, as it would have been had the language applied equally well to each of two parcels.

But the defendant says that the testimony was admissible to meet the plaintiffs' evidence of the meaning of "demonstration" as understood in the trade. But that evidence did not touch the matter of the oral statements objected to, and did not open the door for them. The same kind of evidence was given in *St. Martin v. Thrasher*, 40 Vt. 460, and yet direct statements of intention were excluded.

The defendant also says that it was all a closely connected part of a conversation in which the plaintiff made an admissible declaration as to what constitutes "satisfactory demonstration"—an admission of what he understood that expression to mean, and that therefore all he said on the subject at the time was admissible as a part of said declaration. But what

he said was not a part of said declaration, but was the declaration itself, and not admissible.

It is further claimed that the statements were admissible because the document is not dispositive, but only evidentiary. But we think it dispositive. It is signed by both parties, and contains mutual promises. In it the defendant agrees to buy one automobile, and pay so much therefor on delivery and satisfactory demonstration. If he buys four more by such a time "after the one bought this day," the plaintiffs agree to allow him so much commission on the five.

It is further claimed that the statements were harmless, as the court instructed the jury to disregard them, and that the words, "satisfactory demonstration," did not include sending a man around with the defendant to help him sell machines. But their harmlessness does not appear. The case comes clearly within the rule that error in the admission of evidence cannot be cured by instructing the jury to disregard it. *State v. Meader*, 54 Vt. 126.

As to defendant's testimony on re-examination, that he should not have purchased an old model machine for a demonstrating car had he known it, it is enough to say that it does not appear but it was made admissible by the cross-examination.

If it was matter of law and not of fact, as claimed, whether the defendant accepted the automobile, it was harmless to submit it to the jury, for it found acceptance, as the case shows by necessary inference, for otherwise the verdict would not have been warranted.

The plaintiffs excepted to submitting to the jury whether they personally or by their agents represented to the defendant that the car they sold him was a 1903 model, but only on the ground that there was no evidence tending to show

such fact. Hence the other grounds now urged under that exception will not be considered. It is not claimed that there is no evidence tending to show that the plaintiffs themselves did not so represent, but only that there is none tending to show that Walker did. But the defendant's testimony tended to show that Walker did, in effect; for he explained to the defendant the use and necessity of a fusible plug as an equipment of a steam automobile, and represented to him that all Grout automobiles were thus equipped, and that the air pump of the plaintiffs' machines was a much better system of generating air than the Stanley system. The plaintiffs' 1903 cars had both of these equipments, but their 1902 cars, of which the defendant's was one, had neither. Thus Walker's representations amounted to saying that the defendant's was a 1903 car.

The charge on the subject of damages "as per defendant's requests" was excepted to, but no ground stated. It was that the evidence tended to show that there was a market for Grout automobiles in certain of defendant's territory, and that at least three might have been sold there with satisfactory demonstration. Plaintiffs claim there was no evidence warranting the charge. Defendant claims the contrary, and that the exception is too general to be available. But it would serve no useful purpose to decide the matter, it is so likely to be changed on another trial.

The motion to set aside the verdict for want of evidence to sustain it was properly overruled.

Reversed and remanded.

EDMUND C. MOWER, TRUSTEE IN BANKRUPTCY v. JAMES D.
MCCARTHY AND JAMES B. BRODIE.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, POWERS, and MILES, JJ.

Opinion filed August 14, 1906.

Trustee in Bankruptcy—Title to Bankrupt's Property—Replevin—Verbal Chattel Mortgage—After-Acquired Property—Possession of Mortgagee—Effect—Federal Bankruptcy Act—Evidence—Admissions of Bankrupt—Conspiracy—Admissions of Co-Conspirators.

A verbal mortgage of chattels to be subsequently purchased by the mortgagor is valid between the parties.

Where, after the condition of a verbal chattel mortgage is broken, and before the rights of third parties have intervened, the mortgagee takes possession of the property covered by the mortgage, but purchased since it was given, such property is in his possession as of the date the mortgage was given.

Defendant's son gave him a verbal mortgage upon a stock of goods about to be purchased by the son to establish a retail business, and upon all goods subsequently purchased to replenish or increase the original stock, as security for the payment of a contemporaneous loan of money wherewith to start the business, and of all future loans, with the agreement that defendant might, at any time, take possession of the store and goods under his mortgage. The son purchased the goods, established the business, and conducted it for a year and a half, replenishing the stock from time to time. Then, defendant, who had made other loans to the son under said agreement, the mortgage debt being over due, took possession of the stock and store under said mortgage, having reasonable cause to believe that the son was then insolvent, but not having reasonable cause to believe that his thus taking possession was intended by the son to give him a preference over other creditors. *Held*, in replevin by the son's trustee in bankruptcy, appointed under proceedings begun about a month after

defendant took possession, that said agreement was a valid common law mortgage; that defendant was in possession of all the property covered by the mortgage as of the date it was given; that the son had no interest in the property, except the right to redeem; and that, therefore, his trustee in bankruptcy had only that right.

It cannot be held, as matter of law, that such a mortgage is fraudulent and void as to the other creditors of the mortgagor. That is a question of fact for the jury.

Neither do such verbal mortgages come within the amendment of 1905 to §60a of the Federal Bankruptcy Act: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording of the transfer, if by law such recording or registering is required." That relates only to written instruments required by law to be recorded.

Where a conspiracy is claimed, *prima facie* proof thereof must be made before the admissions of an alleged conspirator can be properly received in evidence against his claimed confederate.

The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud the creditors of the former, does not create such a privity of estate as makes the declarations of one admissible in evidence against the other.

A trustee in bankruptcy is the successor to all the rights which the bankrupt possessed in his non-exempt property; and in replevin by said trustee against a third person to recover such property, the trustee must recover through the bankrupt's title; hence, the bankrupt's declarations against his title to such property, made while it was in his possession and before his bankruptcy, are admissible in evidence in favor of the defendant.

REPLEVIN by a trustee in bankruptcy. Plea, the general issue. Trial by jury at the March Term, 1905, Chittenden County, *Watson*, J., presiding. Only special verdicts were returned, upon which defendants had judgment for the property replevied, for one cent damages and their costs. The plaintiff excepted.

It appeared that defendant took possession of the property in question on the evening of April 3, 1903, and that Arthur

McCarthy had no part in that matter, and knew nothing about it till the next morning. Plaintiff offered in evidence the schedules filed by the bankrupt in his bankruptcy proceedings, as tending to show that the verbal chattel mortgage, under which the defendant claimed, never existed; and for the same purpose plaintiff offered certain written statements made by the bankrupt to his creditors, as a basis of credit, and signed by him, stating, among other things, that the goods in question were free from incumbrance. Both these offers were excluded, to which plaintiff excepted. The other facts are fully stated in the opinion.

E. C. Mower, and Powell & Powell for the plaintiff.

The agreement proved is simply an agreement to give a lien at any time the father might see fit to take possession of the store. No one can convey property, by mortgage or otherwise, which is not in existence at the time of the conveyance. *In re Hunt*, 14 A. B. R. 424; *Matthews v. Hardt*, 9 A. B. R. 376; *Burdette v. Hunt*, 43 Am. Dec. 289; *Peabody v. London*, 61 Vt. 328; *Robinson v. Elliott*, 21 Wall. 513; *Means v. Dowd*, 128 U. S. 273.

This mortgage is void as to the creditors of the mortgagee, under the amendment to § 60a of the Federal Bankruptcy Act. *Wilson Bros. v. Nelson*, 7 A. B. R. 142; *In re Klingaman*, 4 A. B. R. 258; *Babbitt v. Kelley*, 9 A. B. R. 335; *Myers Bros. Drug Co. v. Pipkin Drug Co.*, 14 A. B. R. 477; *Stewart v. Platt*, 101 U. S. 731; *Gilbert v. Vail*, 60 Vt. 265; *In re Garcewich*, 8 A. B. R. 149; *Thompson v. Fairbanks*, 196 U. S. 526.

If the trustee in bankruptcy were the universal successor of the bankrupt, and took the property impressed with all the

liens of the bankrupt, then the claim of defendants might have some foundation. But the test of the trustee's right is whether the property could be taken in execution. *Collender Co. v. Marshall*, 57 Vt. 232; *Bingham v. Jordon*, 79 Am. Dec. 748; *Briggs v. Parkman*, 37 Am. Dec. 89; *Haskell v. Merrill*, 179 Mass. 120; *Re Allen's Est.* 65 Vt. 395.

This alleged verbal chattel mortgage and defendant's possession thereunder, constitutes a preference voidable under § 60b of the Federal Bankruptcy Act. *Benedict v. Deshel*, 11 A. B. R. 20; *Sebring v. Wellington*, N. Y. Sup. Ct., Appellate Div., 6 A. B. R. 671; *Western Tie & Timber Co. v. Brown*, 13 A. B. R. 447; *Hackney v. Raymond Bros.*, 10 A. B. R. 214; *Johnson v. Wald et al.*, 2 A. B. R. 84; *Christopherson v. Oleson*, 102 N. W. 685; *Upson v. Mount Morris Bank*, 14 A. B. R. 6; *Peperdine v. Nat. Exchange Bank*, 10 A. B. R. 570; *Brounell v. Russell*, 76 Vt. 331.

The offered schedules of the bankrupt, and the written statements signed by him and made to merchants as a basis of credit, showing that the goods in question were free from incumbrance, should have been admitted. *Cox v. Eayres*, 55 Vt. 24; *Good v. Knox et al.*, 64 Vt. 99; 2 Wig. Ev. §§ 902, 906; *Ramsbottom v. Phelps*, 18 Conn. 278; Wig. Ev. §§ 1086, 1087; *Moon v. Hawkes*, 2 Aik. 390; *Bullard v. Billings*, 2 Vt. 313; *Carpenter, Admr. v. Hollister*, 13 Vt. 552; *Miller v. Bingham*, 29 Vt. 82; *Webb v. Richardson*, 42 Vt. 472; Wig. Ev. §§ 1081, 1086, 1779; *Tatman v. Humphrey*, 12 A. B. R. 65; *Clayton v. Exchange Bank of Macon*, 10 A. B. R. 183; *Fletcher v. Wakefield*, 75 Vt. 263.

V. A. Bullard, and R. E. Brown for the defendants.

The evidence tended to establish a valid chattel mortgage. *McCloud v. Wakefield*, 70 Vt. 558; *Thompson, Trus., v. Fairbanks*, 75 Vt. 361.

The trustee in bankruptcy acquired no greater rights in the property than the bankrupt had. *Rice's Assignees v. Hulett*, 63 Vt. 321; *Chase v. Denney*, 130 Mass. 566; *Etherbridge v. Sperry*, 139 U. S. 266.

The declarations of the bankrupt against his interest in the property in question, made while it was in his possession and before his bankruptcy, were admissible against plaintiff. *Rubber Co. v. Duncklee*, 30 Vt. 29; *Downs v. Belden*, 46 Vt. 67; *Miller v. Bingham*, 29 Vt. 824; *Alger v. Andrews*, 47 Vt. 238; *Davis v. Bank*, 48 Vt. 532; *Wheeler v. Wheeler*, 47 Vt. 637; *Bucklin v. Beals*, 38 Vt. 653.

TYLER, J. On August 15, 1901, defendant McCarthy loaned his son Arthur \$5,000 with which to purchase a stock of goods and establish a clothing business in Burlington, and afterwards loaned him \$2,000 and \$1,000 for the same purpose and took his promissory notes for the several sums. When the \$5,000 was furnished Arthur gave the defendant a verbal mortgage upon the stock that was then to be purchased as security for the repayment of that loan, and of all future loans that should be made, and it was understood between them that the mortgage should include the fixtures in the store and all goods that should be subsequently purchased to replenish or increase the original stock, and that the defendant might, at any time, take possession of the store and goods under his mortgage. Arthur had no capital; he carried on the business with the money loaned him by the defendant from August, 1901, till April, 1903. The defendant and his wife held a lease of the store during the continuance of the busi-

ness. Arthur paid most of the rent and managed the business in all respects as if it were his own.

On April 3, 1903, the defendant by Brodie, a deputy sheriff, took possession of the store, fixtures, and goods by virtue of his mortgage and upon a writ that he sued out against his son. All the notes were then due and nothing had been paid upon them but \$321.82 on the \$1,000 note.

The defendant claimed that he took possession for the purpose of completing his mortgage, and that the property was rightfully in his possession by virtue thereof at the time it was taken from him by the plaintiff in this suit. The plaintiff claimed that the two McCarthys conspired to defraud the merchandise creditors and to obtain all the property for the defendant and thereby for their mutual benefit.

A petition in bankruptcy was filed against Arthur on May 15, 1903, and he was adjudged a bankrupt on June 6 following. He was insolvent at the time of the adjudication and his liabilities were far in excess of his assets.

The present action is replevin in which the plaintiff, as the trustee in bankruptcy of the estate of Arthur, seeks to recover the property described in the writ as belonging to the estate, while the defendant claims it by virtue of his verbal mortgage.

Neither of the McCarthys ever informed any of Arthur's creditors of the verbal mortgage nor of the existence of any lien upon the goods. The creditors had been pressing Arthur for payment before the defendant took possession, and the evidence tended to show that some steps had been taken towards making a sale of the bankrupt's stock and of a pro rata division of the proceeds among the creditors, and that this was with the defendant's knowledge and sanction.

Special verdicts were submitted and the jury found in substance as above stated, that by the agreement relative to the verbal mortgage the defendant was to be secured on the goods, furniture, and fixtures for the money advanced by him, also upon all goods that might be added to the stock until the advancements were repaid; that he was to have a right to take possession of the mortgaged property whenever he saw fit; that he took possession under his mortgage by his agent Brodie, April 3, 1903; that he was in possession of the mortgaged property when the writ in this suit was served; that \$1,000 worth of the original stock was then on hand; that when the defendant took possession he had reasonable cause to believe that his son was insolvent, but that he did not have reasonable cause to believe that his thus taking possession was intended by his son to give him a preference over other creditors.

1. The agreement made by the McCarthys constituted a common law mortgage, which is defined to be an absolute sale of the property by the mortgagor to the mortgagee, subject to be redeemed according to the terms of the contract. *Hutchins v. King*, 1 Wall. 53; *Wood v. Dudley*, 8 Vt. 430; *Blodgett v. Blodgett*, 48 Vt. 32. So it was held in *Rice's Assignee v. Hulett*, 63 Vt. 321, that the giving of security upon chattels, without delivery, is in effect a mortgage at common law and may be valid between the parties, though not in writing. Jones Chat. Mort. § 2. An unrecorded mortgage is valid between the parties. *Gilbert v. Vail*, 60 Vt. 261. It is also held that where, as in the present case, it is stipulated that the mortgagor may from time to time sell portions of the mortgaged property and replace it with other property of similar kind and value, and the mortgagee takes possession of it, it is brought under the operation of the mortgage as of

the date thereof. *Peabody v. Landon*, 61 Vt. 318. And in *McCloud v. Wakefield*, 70 Vt. 559, it is held that if there is no stipulation to the contrary, the mortgagee may at any time take possession of the mortgaged property, and that having taken possession of the goods covered by the mortgage but purchased after its execution and delivery, such goods come under its cover and operation as of its date. *Thompson, Trustee, v. Fairbanks*, 75 Vt. 361, goes to the extent of holding that a chattel mortgage on after-acquired property, under which the mortgagee has taken possession of such property with the mortgagor's consent, is valid against the mortgagor's trustees in bankruptcy, in the absence of an express finding that such possession was taken for the purpose of affording a preference, though possession was so acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. This judgment was affirmed in 196 U. S. 516, 49 Law. ed. 577. This was the holding in *Chase v. Denny*, 130 Mass. 566. These decisions go upon the ground that the mortgagee's title to the after-acquired property relates to the date of the mortgage, and that his taking possession is not the acceptance of a preference but the assertion of a previously acquired right. After the condition of this mortgage had been broken and the mortgagee had taken possession of the mortgaged property, the mortgagor had no interest in the property other than a right to redeem it, and the trustee in bankruptcy had no greater interest therein than the mortgagor.

It must therefore be held that, unless the present case is distinguishable from the recent cases decided by this Court, the judgment of the trial court must be affirmed.

The rule of law that one cannot convey property that is not in existence at the time of the conveyance, like fish to be caught in the sea, (*Low v. Pew*, 108 Mass. 347) does not apply here. The findings of the jury were that it was understood between the father and son that the former was to be secured on the goods for the money advanced by him, and that this included whatever goods were in the store at the time of the \$5,000 loan and all goods that might thereafter be added to the stock; so it is not made clear whether or not all or any part of the original purchase had then arrived. But assuming that none had arrived when the first loan was made, it was the intent of the parties that the mortgage should attach to the goods when they were placed in the store, and in this respect the goods originally and subsequently purchased stood precisely alike as being subject to the mortgage.

It was held in *Bryan v. Lewis*, R. & M. 386, 21 E. C. L. 467, that a sale of goods to be delivered at a future day, when the seller has not the goods nor any contract for them, but expects to go into the market and buy them, is not a valid contract. But this has been overruled in England, and in this country it is the rule that a person may sell chattels of which he is not at the time the owner or possessor. 2 Kent, 13th ed. 468; 24 Am. & Eng. Ency. 1043 and notes. A chattel that has ceased to exist or that never had an existence is not the subject of a sale, though an article that has a potential existence, like the natural product or expected increase of property belonging to the seller, may be the subject of an executory contract of sale. But no question is raised in the present case as to the non-existence of the goods at the time the mortgage was given for the reason that the mortgagee, by virtue of the agreement and the non-payment of the notes, took actual possession of the property and was in possession

thereof when the petition in bankruptcy was filed. *Peabody v. Landon*, page 329; *Forsyth Mfg. Co. v. Castlen*, 81 Am. St. 28 and note.

Matthews v. Hardt, 9 A. B. R. 373, is not an authority for the plaintiff, for in that case there was nothing but an agreement to give a lien on property, the parties so treated the transaction, and the lien was not to be enforced until advances to a certain amount had been made. See *Matter of Hunt*, 14 A. B. R. 416.

The plaintiff argues that there is nothing in the case to indicate that Arthur could not have sold the entire stock at any time if he had so chosen, and that the case is therefore brought within the rule recognized in *Wilson v. Wallace*, 67 Vt. 646, that an absolute right in the mortgagor to dispose of the property in one transaction for his own benefit vitiates the mortgage. The exceptions do not show such an agreement between the parties to this mortgage, and from what does appear we think the fair inference is that they intended that Arthur should begin and carry on a retail business in the usual manner, keeping up the stock; and he did so conduct the business for a year and a half from August 3, 1901.

2. The plaintiff further contends that notwithstanding the finding by the jury that the defendant did not have reasonable cause to believe that his taking possession was intended by his son to give him a preference over the other creditors, the transaction was voidable under the Bankruptcy Act. *Peabody v. Landon* is reported in 15 Am. St. R. 903, with full notes by Mr. Freeman wherein he speaks of the wide difference in judicial opinions upon this subject, and gives his own opinion that the weight of reason is with those who maintain that such a mortgage as the one here under consideration, with like agreements contemporaneously made, is fraudulent and

void as to subsequent purchasers or creditors of the mortgagor; but he says that it is for each state to adopt that line of decisions which best accords with its own views of public policy and seems to its judges to be best sustained by reason and authority. (See *Humphrey v. Tatman*, 198 U. S., 91, 49 Law. ed. 956, 184 Mass.) The writer cites numerous authorities in support of his view, and a "respectable number" which decide that it cannot be held as matter of law by the court that such a mortgage is fraudulent and void, but that it is for the jury to determine as a question of fact. He cites among other cases *Lister v. Simpson*, 38 N. J. Eq. 438, where the Court closed an able opinion by saying that the mere fact that a mortgagor retains possession and uses the mortgaged chattels has never been accepted in that State as conclusive and unanswerable evidence of fraud.

The plaintiff cites many cases from the Am. Bank. R. which hold that where a debtor is insolvent within the meaning of the Bankruptcy Act and the creditor has knowledge of the insolvency, or has such information as would put a prudent man upon inquiry, and receives a payment, it follows as a necessary inference that he had reasonable cause to believe that it was intended as a preference. *Pepperdine v. National Exchange Bank*, 10 A. B. R. 570, Missouri Court of Appeals, which states this rule with much force. The New Hampshire cases cited by the plaintiff disfavor such agreements, calling them secret trusts.

Humphrey v. Tatman, 184 Mass. 361, is an authority for the plaintiff for it is there held that the preference created by a mortgagee taking possession of the mortgaged property under an unrecorded mortgage, within the four months period, dates from the acquisition of possession under the mortgage. Knowlton, Ch. J., remarked in his opinion that, "the reason

for the enactment, as it is interpreted, is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies that there was no encumbrance on his stock or fixtures,—a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all the debtor's property, and leave nothing for the other creditors who had trusted him because of his possessions." *Clayton v. Exchange Bank of Macon*, 10 A. B. R. 183 (U. S. C. C. A., Fifth Circuit) is like the Massachusetts case in its facts and in the statement of the law by the Court. But *Humphrey v. Tatman* was reversed in 198 U. S. 91, 49 Law. ed. 956.

3. The plaintiff also contends that the case falls within the amendment of 1905 to section 60a, which is: "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required;" but this obviously relates to written chattel mortgages which are required by law to be recorded; therefore the amendment does not control here.

In this case, upon the findings of the jury, there was no actual fraud. All the money that went into the purchase of these goods was the defendant's. Upon the failure of his son to repay the loans, the defendant had the right to take possession of the goods and preclude the creditors from sharing in the proceeds of their sale, and his taking possession related to the time of the agreement. This has been the holding of this Court in former cases, and we find no occasion to

depart from it, although the courts in many of the states maintain a different doctrine as has been shown.

4. The plaintiff contends that there was error in the admission and exclusion of evidence. The plaintiff claimed in the court below and claims here that the original agreement between the McCarthys was fraudulent; that they conspired to defraud the jobbers, who sold goods to Arthur, by obtaining them for the mutual benefit of the father and son. The conceded facts show that the agreement was in effect a common law mortgage, yet the plaintiff might show by competent evidence that the business was carried on by Arthur with a purpose to obtain all the goods he could without paying for them and then have his father take possession of them upon his mortgage. It was in this view that the false statements made by Arthur to his creditors were offered. Those statements and the fact that Arthur after his father took possession removed \$2,500 worth of goods from the store in the night time and stored them in another town show *his* intention to defraud his creditors. If the action were against him these statements would have been admissible in proof of his fraud; but the action is against his father, and there was no evidence offered that tended to connect the defendant with these statements. Indeed, the court said in ruling them out, that if any evidence should afterwards be offered tending to connect the defendant with them the offer of them in evidence might be renewed. As such evidence was not produced the statements could not have affected the defendant's liability any more than the evidence of Arthur's removing a part of the goods from the store without the defendant's knowledge. It is also a well settled rule, where an attempt is made to show conspiracy, that a foundation must first be laid by proof sufficient in the opinion of the trial court to establish *prima facie* the fact of

conspiracy between the parties, or proper to be laid before the jury as tending to establish such conspiracy before admissions of an alleged co-conspirator can be admitted. I Greenl. Ev. § III. The exceptions show that the necessary foundation was not laid in this case.

5. The mere relation of mortgagor and mortgagee, in the absence of evidence of collusion between them to defraud the creditors of the former, did not create such a privity of estate as entitled the plaintiff to use the declarations of one against the other. There was nothing suspicious or unusual in the conduct of the defendant. He had loaned his son \$8,000 upon his notes secured by what we hold was a valid mortgage. He learned that his son was in debt and insolvent, and, by virtue of the agreement, he took possession of the goods and fixtures. He does not claim under a right acquired subsequent to his son's declarations, but under a prior right, and when he exercised that right by taking possession, his title dated back to the time of making the mortgage.

It must be seen that if the statements had been received in evidence, the jury could have made no legitimate use of them as affecting the defendant's liability, for no relation was shown to exist between him and his son that made the declarations of the latter evidence against him.

6. The testimony of Donlin was that he was told by Arthur, soon after the business was undertaken, that the defendant had loaned him five or six thousand dollars to go into business with, and that the defendant was to have the right at any time to take possession of the property. This evidence was admissible for the reason that the plaintiff, as trustee, was successor to all rights of property that Arthur possessed and that he must recover through Arthur's title. It was held in *Alger v. Andrews*, 47 Vt. 238, that the declarations

of one against his title to property, made while in his possession and before he assigned it to the defendants, were admissible against the defendants. See *Bucklin v. Beals*, 38 Vt. 653; *Davis v. Windsor Savings Bank*, 48 Vt. 582. This admission stands upon opposite ground from that upon which Arthur's statements to his creditors were offered in evidence. They were in support of the plaintiff's claim of title, while this admission makes against that claim and against the plaintiff's interest.

There was no error in the rulings. *Judgment affirmed.*

I. S. JENNEY v. J. W. ALDEN, M. O. OLIVER; and
G. C. LENNERT.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed September 21, 1906.

Annual Town Meeting—Adjournment Sine Die, without Election of Officers—Effect—Mandamus—Selectmen—Special Town Meeting for Election of Officers—V. S. 2972, 2980.

The provisions of V. S. 2972, 2980, that a meeting of the voters shall be annually held in each town for the election of officers and the transaction of other business, at which meetings certain enumerated officers shall be chosen, are positive legislative commands. The voters are not to decide when or how often they shall hold an election.

Where the voters assembled in a duly warned annual town meeting, without electing any of the officers or transacting any of the business specified in the warning, adjourned without day, a writ of mandamus will issue, on the petition of a resident voter and taxpayer, directing the selectmen forthwith to call a special town meeting for the election of officers.

The adjournment without day in those circumstances amounted to "a failure to hold such meeting," within the intent of V. S. 2972, providing that, "A failure to hold such meeting shall not prevent the election of town officers at any subsequent meeting legally warned and holden."

PETITION FOR MANDAMUS to compel selectmen to call a special town meeting for the election of officers, brought to the Supreme Court for Addison County at its May Term, 1906, and then heard on petition, answer, and testimony taken and filed.

The second petition presented to the defendants was the petition signed by O. C. Huntley and others, and required defendant to call a special town meeting "for the following purposes." Then follows an exact copy of the several articles in the warning of the annual meeting which was adjourned without day.

Davis & Russell for the relator.

Butler & Moloney for the defendants.

The result of the adjournment was to make all officers previously elected hold over for another year. Hence, as there were no vacancies to fill, the meeting which the petition asked defendant to call would be fruitless, and, therefore, not lawful. *Cummings v. Clark*, 15 Vt. 654; *Sch. Dist. v. Smith*, 67 Vt. 566; 5 Am. & Eng. Enc. 106.

POWERS, J. This is a petition for a writ of mandamus brought against the selectmen of the town of Leicester by a voter and taxpayer therein, to compel such selectmen to call a special meeting of that town for the election of officers and the transaction of other business.

It appears that the defendants were duly elected selectmen of the town of Leicester at the annual meeting of that town in 1905. As such, they duly warned the March meeting of 1906 to be held at the town hall of the town on the first Tuesday of March at one o'clock in the afternoon, at which time and place some ninety-four or more of the legal voters assembled, and, without electing any of the officers required by law then and there to be chosen, or considering or transacting any of the business specified in the warning for such meeting, adjourned without day. On the following day, March 7, a petition signed by six legal voters of the town was presented to these selectmen requiring them to call a special meeting of the voters of the town for the election of town officers. The defendants did not comply with this application, but called a special meeting "to see if the voters of the town will raise sufficient money to defray the expenses of the town for the ensuing year," only. Thereupon, another petition was presented to the defendants signed by more than six legal voters of the town requiring them to call a special town meeting for the election of officers and the transaction of other business such as is usually passed upon at March meetings. This application has been ignored by the defendants, and this proceeding is instituted to compel the defendants to call a special meeting under this last named petition.

Our statute (V. S. 2972) provides that a meeting of the voters shall be held in each town on the first Tuesday of March, annually, for the election of officers and the transaction of

other business, and (V. S. 2980) that certain enumerated officers shall be chosen at such annual meetings. These are positive legislative commands. It is not left to the voters to decide when and how often they shall hold an election. The time is definitely fixed by law, and a plain duty put upon the voters to act accordingly. And were it not for the last clause of the section of the statute first above referred to, providing that a failure to hold such annual meeting should not prevent the election of town officers at any subsequent meeting legally warned and holden, a town would, in the event that no election was had on the day specified, be powerless to elect officers until the next annual meeting, and the old officers would hold over throughout the year as provided in the section last above referred to.

Since "a failure to hold such meeting" affords the only legal ground for an election of town officers at "any subsequent meeting," the case turns on the character of the meeting held in Leicester on the first Tuesday of March last as hereinbefore recited.

It cannot be fairly said that any such meeting as the statute contemplates and requires was held. True the voters assembled, but they refused to hold the meeting in any proper sense, and adjourned it in disregard, if not in defiance of the plain mandate of the law. We put little stress on the question whether the adjournment was taken with intent on the part of the majority to circumvent the will of the voters in the matter of town officers, for the result is the same whatever the motive,—the rights of the minority are disregarded and the law defrauded. The case of *Stone et al. v. Small et al.*, 54 Vt. 498, is much in point and the reasoning of the Court therein especially applicable. The charter of the village of Winooski required its officers to be elected at its annual meeting to be held

on a day specified. An amendment enacted in 1880 made some changes in the officers to be chosen at the annual meeting, and provided that each of the three wards of the village should elect two of the trustees and one of the fire wardens, instead of those officers being elected by general vote of the voters of the whole village as before. At the annual meeting in 1881, a majority being opposed to the change, adjourned the meeting from time to time and finally without day, without electing officers or doing any business,—the old officers holding over under the terms of the charter. At the annual meeting in 1882, the majority, still being opposed to the change, adjourned the meeting without day. But the minority stayed in the hall, reorganized the meeting and elected a board of trustees in conformity with the new requirements of the charter. The validity of this election being tested by mandamus proceedings in behalf of the new trustees to obtain from the old board the books and papers belonging to the office, it was held that the action of the majority was unlawful and that the new trustees were legally elected. The Court adopts the New Hampshire rule laid down in *Kimball v. Marshall*, 44 N. H. 465, wherein Bell, C. J., in speaking of assemblies upon which the law casts the performance of certain duties on particular days, says: "It must either be held that the body, once assembled, cannot adjourn till the business is done, or that so many as are ready to perform the duty shall be competent to continue the meeting until the object is accomplished. Of these consequences, both may be held to follow under circumstances. The majority could make no legal adjournment to such a time as would defeat the performance of the prescribed duty; and a minority might keep the meeting in existence by adjournments till the duty was done." This is conclusive of the question before us unless the minority lost their rights by dispersing

without action. And we think the minority lost nothing by this, for the adjournment was unauthorized and illegal. We adopt the language of Judge Rowell in the Stone case, equally applicable to this: "Any other rule would open the door to great abuse of power, and place a loyal minority too much in the power of a disloyal majority."

The petition is sustained with costs. Let a writ of mandamus issue directing the defendants as selectmen to call forth with a special meeting of the voters of the town of Leicester for the election of the officers and the transaction of the business specified in the petition of O. C. Huntley and others set forth in this petition.

W. G. SCHOFIELD'S ADMX. v. METROPOLITAN LIFE INSURANCE CO.

, May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and MILES, JJ.

Opinion filed October 27, 1906.

Insurance Policy—Statements in Application—Warranties—Effect of Incorrectness—Applicant's Honest Belief—Illness Defined—Evidence—Burden of Proof—Question for Jury.

Where a life insurance policy purports to have been issued partly in consideration of the assured's answers and statements contained in his written application therefor, which answers and statements are by the terms of the policy made warranties and a part thereof, if any such answer or statement is incorrect, it is a false war-

ranty and vitiates the policy, regardless of whether the applicant honestly believed it to be true.

In assumpsit on such a policy of life insurance, where the defence is that certain answers of the assured in his written application are incorrect, the burden is on the defendant to establish that fact.

Where there is any substantial evidence tending to support plaintiff's case, it would be error to direct a verdict for defendant.

In assumpsit on a life insurance policy purporting to have been issued partly in consideration of the assured's answers contained in his written application therefor, which answers are by the policy made warranties and a part thereof, evidence examined and *held* that whether certain of said answers were correct was a question properly submitted to the jury.

The fact that the brother of the assured received a letter from him mailed in Colorado in the winter of 1901-1902 does not tend to prove either that the assured then had consumption or that he then resided in Colorado; hence, it was not error for the court to refuse to allow defendant's counsel to argue to the jury, on that evidence, that Colorado and California were resorts for consumptives, and that the insured went there in the winter of 1901-1902.

The word "illness," as used in questions to an applicant for life insurance, means a disease or ailment of such a character as to seriously affect the healthfulness of the system, and not a mere temporary indisposition.

ASSUMPSIT on a policy of life insurance. Plea, the general issue and notice. Trial by jury at the September Term, 1905, Washington County, *Powers*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The court's instruction on the question of illness referred to in the third exception, was as follows:

"A mere temporary indisposition, not serious in its nature, is not an illness within the meaning of this inquiry. Illness as here used means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution. So that

if there was an illness within the meaning of this term in this question, it must have been of the character I have indicated to you. And any illness, either under this question or under the consumption question, must be one that has become seated in the person so as to have begun its work of destruction to the health and constitution of the applicant, in this case, Schofield."

Zed S. Stanton, and *Senter & Senter* for the defendant.

The answers in the insured's written application are warranties, and if any one is untrue, the policy is void, regardless of the honest belief of the insured. *Northeastern Mut. Life Ass'n*, 50 Vt. 630; *Cerys v. State Ins. Co.*, 27 Ins. Law Jour. 258; *Metropolitan Life Ins. Co. v. Moravec*, (Ill.) 73 N. E. Rep. 415; *Hartford Life and Annuity Co. v. Gray*, 91 Ill. 159; *Wright v. Equitable Life Assurance Soc.*, 50 How. Prac. 367; *Modern Woodmen of Am. v. Van Wald*, 49 Pac. Rep. 782; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Woehrle v. Metropolitan Life Ins. Co.*, 46 N. Y. Supp. 862; *Vose v. Eagle Life etc. Co.*, 6 Cush. 42; *National Union v. Arnhorst*, 74 Ill. App. Court 482; *The Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 264; *Mut. Life Ins. Co. etc. v. Arhelger*, 4 Ariz. 271; *Knights of Damon v. Wood*, 120 Ga. 328; *Hutton v. Waterloo Life Ins. Co.*, 1 Falc. & F. 735; *May, Ins.* §303; *Phillips v. New York Life Ins. Co.*, 9 N. Y. Supp. 836; *Horn v. Mut. Life Ins. Co.*, 64 N. Y. Super. Ct. 81; *Edington et al. v. Aetna Life Ins. Co.*, 100 N. Y. 536; *Cazenove et al. v. British Equitable etc. Co.*, 6 C. B. 437; *Everett v. Desborough*, 5 Bing. 693; 1 *Beech Ins.* §437; *Cobbs v. Covent Benefit Association*, 155 Mass. 176; *Metropolitan Life Ins. Co. v. McTague*, 48 N. J. L. 592; *White v. Providence Assurance Co.*, 163 Mass. 109.

That Colorado was a place to which consumptives resorted is so notorious, so universally known, that defendant's counsel had the right to argue that matter to the jury. *Humphrey v. Burnside*, 4 Bush. 215; *Hart v. Bodley*, Hardin (Ky.) 98; *Hoare v. Silverlock*, 12 Q. B. 624; Taylor on Ev. §4, Note 2; *Myer v. Krauter*, 56 N. J. L. 698; *Comm. v. Marzenski*, 149 Mass. 72; *Brown v. Piper*, 91 U. S. 37; *Sacalaris v. Eureka & Palisade R. R. Co.*, 18 Nev. 155; *Gilbert v. Flint etc. R. R. Co.*, 51 Mich. 488; *Lake v. Calhoun & Co.*, 52 Ala. 115; *Tehune v. Philips*, 99 U. S. 593; *King v. Gollan*, 109 U. S. 99; *Lohman v. State*, 81 Ind. 15; *Bell v. Kalamazoo Pub. Co.*, 40 Mich. 251; *State v. Price*, 12 Gill & J. (Md.) 260; *Boullemot v. State*, 28 Ala. 83; *Bell v. Barnet*, 2 Marsh J. J. (Ky.) 516; *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478; *Downie v. Hendrie*, 46 Mich. 498; 28 Am. Law Reg., 456, §31, 28 Ala. 83; 28 Am. Law Reg., 462-3, 126 Mo. 168; *Pearce v. Langfit*, 101 Pa. 567; *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571; *White v. Mo. Pac. R. R. Co.*, 19 Mo. App. 400; *Decelis v. U. S.*, 13 Court of Claims, 117; *Rowland v. Miller*, 139 N. Y. 103; *Fowle v. Park*, 48 Fed. 794; *Eureka Vinegar Co. v. Printing Co.*, 35 Fed. 570; *Atchison etc. Co. v. Headland*, 18 Colo. 477; *Benson v. R. R. Co.*, 98 Cal. 45; *State v. Main*, 69 Conn. 123; *Knowlton v. N. H. & H. R. Co.*, 72 Conn. 188; *C. C. C. etc. Co. v. Jenkins*, 174 Ill. 398; *Rosted v. R. Co.*, 76 Minn. 123; *Meyers v. Menter*, 63 Neb. 427; *Hunter v. N. Y. etc. Co.*, 116 N. Y. 615; *Austin v. State*, 101 Tenn. 563; *Mullen v. Sackett*, 14 Wash. 100.

John W. Gordon and *R. A. Hoar* for the plaintiff.

MILES, J. Three questions are raised in this case, viz.: first, did the court below err in refusing to direct a verdict for the defendant; second, was it error for the court to deny the

request of counsel for the defendant, for "leave to argue to the jury that California and Colorado were places where consumptives go," and third, was the charge of the court respecting what constituted illness, error?

A motion to set aside the verdict was made by the defendant, and a large number of requests to charge were attached to the bill of exceptions, but they did not show that there was any exception taken to a refusal to comply with them, and the defendant makes no point as to either; hence they are disregarded by us in the consideration of this case.

The action is assumpsit upon a life insurance policy issued upon the application of the plaintiff's intestate. The policy bears date Nov. 30, 1901, and the considerations expressed are the answers and statements contained in the printed and written application for the policy and the annual premium of forty-four dollars and sixty-nine cents; which answers and statements in the application are, by the terms of the policy, made warranties and a part of the policy. The terms of the policy are also made subject to the conditions set forth on its reverse side, and provide that those conditions are made and accepted by the insured as a part of the contract of insurance. The only condition alluded to in the policy having a bearing upon any question in this case, is the third. That provides, that, if any answer or statement in the application is not true, the policy shall be void and all premiums paid shall be forfeited. The application, among other things, contained a statement, that it was agreed and warranted by the undersigned, the insured, that any false, incorrect or untrue answer should render the policy null and void and should forfeit all payments made thereon, and that the answers and statements contained in the application and those made to the medical examiner should be the basis and become a part of that contract of insurance.

At the close of all the evidence the defendant moved for a verdict on the ground, as it claimed, that the undisputed evidence in the case showed that the insured falsely answered the following questions contained in his statement to the medical examiner, viz.: "Have you ever had consumption?" and "Have you consulted any other physician, if so when and for what?" Both questions were answered, "No."

The authorities do not all agree respecting the effect of an incorrect answer to a question contained in a statement made by the insured to a medical examiner, where the question calls for an opinion and the answer is honestly made in the belief that it is true. Those favoring the rule, that it does not amount to a warranty and so does not render the policy void, base their reasoning upon the presumption that the insurer only expects that the insured will give his honest opinion, as that was all he could give; that, when a correct answer could only be given from an examination by a physician, the insurer, by taking the answer of the insured through its own physician, impliedly gives the insured to understand that an honest and full answer, so far as he knew, is all that is required.

Such are the cases referred to in *May on Insurance*, 2nd ed. §296. In that section the author states as a conclusion arrived at from the weight of authorities upon that subject, as follows: "An honest belief in the truth of his answer is all that is required of the applicant. He may have had repeated attacks of disease, but if he does not know, or have reason to believe that they are within the range of the inquiry, his failure to answer is immaterial, even though in point of fact, they had a tendency to shorten life and to increase the hazard of the risk." Later along in the same section the author says: "In such case the rule seems to be, that if the inquiry calls for an answer which involves a matter of opinion,

the applicant is answerable only for the honesty of his opinion, although the answer be untrue in fact."

Cases holding that such incorrect answers render the policy void, whether honestly made or not are referred to by the same author in section 297 in the following language: "Though some of the cases make use of language strong enough to require that he must answer truthfully at his peril, without regard to the applicant's knowledge of, or reason to believe, the truth of the facts as stated or omitted, yet as we have before seen, the facts in those cases did not require so strong and so extreme a ruling; and it may be doubted, if, in view of the current of opinion, in a case presenting the exact point, the courts using this language will not be found in accord with the other authorities."

Our own State seems to have followed that class of cases which hold that an incorrect answer in the application or statement made to the medical examiner is a false warranty and renders the policy void, whether the applicant believed the answer to be true or false. *Powers v. N. E. Mut. L. Association*, 50 Vt. 630. That being the holding of our own Court, it becomes unnecessary to inquire as to where the balance of authority lies. Following, therefore, our own decided case, which is similar to the case at bar, we hold, that the answers to the questions, "Have you ever had consumption?" and "Have you ever consulted any other physician, and if so, when and for what?" were warranties, and, if false, rendered the policy void.

The question, then, arises, does the undisputed evidence show, that they or either of them were false?

It is elementary, that, if there is any substantial evidence supporting the plaintiff's claim, the court will not direct a

verdict for the defendant, but must submit the question to the jury.

The defendant's evidence tended to prove that at the time the policy was obtained by the insured, he had consumption. This evidence was based upon opinion formed from the discovery of tubercular bacilli in the sputum of the insured and upon personal examination. Medical authority produced by the plaintiff testified that it was not conclusive evidence that the insured had consumption because tubercular bacilli were found in his sputum, and, that his sputum having been examined on a later date, and two tests having been made and no tubercular bacilli then being found, the conclusion naturally followed that the tubercular bacilli found on the former occasion was not the product of consumption, but was a result often obtained from the examination of the sputum of a healthy person. Dr. Jackson, the defendant's examining physician, who made the examination of the insured and who took the statements and answers, claimed by the defendant to be false, testified, that in his judgment, the insured did not have consumption at the time of making his application for, and taking out this insurance. His testimony, as well as that of several other witnesses, tended to prove that the insured did not die of consumption. There was other evidence in the case tending to prove that the insured did not have consumption at the time he answered "no" to the question, "Have you ever had consumption?" There was also evidence in the case tending to prove that the insured never had consumption previous to taking out the policy of insurance in question. Enough has already been shown, without alluding further to the evidence, to justify the court below in refusing to direct a verdict for the defendant upon this point.

To show that the insured answered falsely the question, "Have you consulted any other physician?" when he answered "no," the defendant produced Doctor Bidwell, who testified in substance, that he first saw the insured June 5, 1901; that at that time he was an examining physician for the defendant; that the insured came to him to be examined, and that on that occasion he did examine him superficially; that the insured said to him that he came to him for that examination because he had been told that he had trouble with his lungs and he wanted another examination. No charge was made for the examination, nor did the doctor advise him to do anything, until shortly before his death, long after the insurance was taken out. The doctor distinctly states that he was not consulted by the insured before the claimed answer, and that he did nothing but examine him. Merely calling into the office of a doctor for some medicine to relieve a temporary indisposition, or simply for an examination to ascertain if there is any ailment or complaint about the person, and for nothing more, is not a consultation by a physician. *Billings v. Metropolitan Ins. Co.*, 70 Vt. 477. The answer of the insured, that he had not consulted any other physician, is not shown by this witness to be false.

Dr. Grout was the only other witness who testified upon this point. He testified that the insured consulted him for four or more years, one or more times in each year, about his physical condition, before making application for insurance; that some time he gave him some general advice, but what it was he could not state, and could not say that he had ever prescribed for him or charged him anything for advice or treatment; nor had he been paid anything by the insured until his last sickness, several months after the insurance had been taken out. Dr. Grout's evidence, as a whole, showed that he had only an indistinct recollection of what occurred on the occa-

sions when the insured visited him and had the consultations to which the doctor testified. He could not remember what the consultations were about, whether more than one took place in each year, and whether they continued through ten or not more than four years. On cross-examination, the doctor testified with reference to those consultations as follows: "How did I know what he had in mind, or whether he came in there with the idea of getting my professional opinion, how could I know? Nothing said or done to indicate what he was there for so you would know."

The testimony of Dr. Grout was exceedingly slight upon this point, even if it had any tendency to prove a consultation; but assuming, though not deciding, that it did have such tendency, there was evidence in the case tending to prove that the insured did not consult Dr. Grout previous to taking out the policy in question.

The evidence of the plaintiff tended to show, that, during the years in which the doctor testified that those consultations took place, the insured was strong, robust and in good health, and that he was not in need of and, in fact, did not receive any medical treatment.

The plaintiff's evidence further tended to contradict Dr. Grout's testimony by showing that his statements made out of court were inconsistent with and contradicted his testimony given in this case. The plaintiff's evidence also tended to prove that Dr. Grout was a witness interested in behalf of the defendant and had taken an active part in its defence.

The defendant's claim being, that the answers of the insured, in the respect complained of, were false warranties and that the insured had committed a fraud, cast upon the defendant the burden of proving that fact. As a matter of law, the court could not presume it in the absence of all proof. *An-*

thony v. Mer. Accident Ins. Co., 44 Am. St. Rep. 369. Indeed, the defendant does not claim that it could, but claims that the testimony of Drs. Bidwell and Grout proves it and that neither is contradicted. We have seen that the testimony of Dr. Bidwell had no tendency to prove it, and, if the testimony of Dr. Grout had a tendency to prove it, there being evidence on the part of the plaintiff contradicting his testimony, the court below was justified in refusing to direct a verdict for the defendant upon that testimony alone, and in submitting to the jury to find whether Dr. Grout's testimony established the fact that the insured consulted him within the meaning of the law as explained in the charge to which no exception was taken. This disposes of the first question upon the ground that Dr. Bidwell's testimony does not tend to show that the insured ever consulted him; and that, if the testimony of Dr. Grout has a tendency to show that the insured, at some time previous to the application for the insurance in question, consulted him, there was evidence in the case tending to disprove it, or, at least, to contradict Dr. Grout's testimony upon this point which would, in effect, be evidence tending to disprove it; for such contradiction might in the minds of the jury wholly discredit the doctor. It is, therefore, unnecessary to decide whether the testimony of Dr. Grout tends to prove that he was consulted by the insured previous to his answers to the medical examiner.

The second exception is to the refusal of the court to allow defendant's counsel to argue to the jury, that California and Colorado were resorts for consumptives and that the insured went to those places in the winter of 1901-1902. The case shows that the only evidence upon this point was, that the brother of the insured received a letter from him mailed from Colorado.

A large portion of the defendant's brief is devoted to a discussion of the question of whether this Court will take judicial notice of the fact that Colorado is a place to which consumptives resort, and that subject was exhaustively treated by the defendant; but we think it unnecessary to decide that question, as it is wholly immaterial.

The only purpose for which the defendant could argue that the insured was in Colorado in the winter of 1901-1902 and that Colorado is a resort for consumptives, would be to show that the insured had consumption at that time. Without saying more respecting the soundness of such an argument, based solely upon the single fact, that the brother of the insured, during that winter, received a letter from the insured mailed in Colorado, we hold, that that fact has no tendency to prove that the insured had consumption, or that he resided in Colorado. That evidence was as consistent with the theory that it was mailed while passing through Colorado as it was with the theory that the insured was residing there at the time it was mailed, besides, we should hesitate to hold, if the evidence did in fact have a tendency to prove that the insured had gone to Colorado to reside temporarily or permanently, that it was evidence that he then had consumption.

We find no error in the court's ruling upon this point.

The third exception is to the court's definition of the term "illness." We find no error in this respect. The language used was substantially that used by this Court in *Billings v. Metropolitan Ins. Co.*, 70 Vt. 477.

Judgment affirmed.

JOHN M. ALLEN'S ADMR. v. LUCY J. ALLEN'S ADMRS., AND
LEE K. OSGOOD.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
MILES, JJ.

Opinion filed October 29, 1906.

Husband and Wife—Bill to Set Aside Voluntary Conveyance—Mental Incapacity and Undue Influence—Evidence—Burden of Proof—Presumption Between Husband and Wife—Master's Report—Review of His Findings—Motion to Recommit—Waiver of Objection—V. S. 939.

A motion to recommit a master's report is addressed to the discretion of the chancellor, and where no abuse of that discretion is shown, his action thereon is not revisable.

Findings of a master will neither be reviewed nor revised where there is evidence tending to sustain them, unless fraud or corruption is shown.

Affidavits which fail to disclose all the evidence received by a master upon which he made his report, are insufficient to set the report aside on the ground that it is not supported by the evidence.

A master is not bound to report his decisions as to the admission or exclusion of evidence, unless so requested in writing by the party against whom the decision is made; in the absence of such request, he may treat the objections as waived.

Objections so waived stand as if they were never in fact made before the master, and will not be considered by the Supreme Court on appeal.

While it is the better practice for a master to report all the facts upon which he bases an ultimate finding, it is not legal error to omit to do so, though the finding be a conclusion resulting from questions of mixed law and fact.

To warrant a court of chancery in setting aside a contract on the sole ground of the mental incapacity of one of the parties thereto, his mental weakness must have been such as to leave him without understanding sufficient to know the consequence of his act.

A hard bargain or inadequate consideration alone will not, ordinarily, justify the interference of a court of chancery; but an inadequate consideration, coupled with such a degree of mental weakness as would justify the inference that advantage has been taken of that weakness, is sufficient ground for equitable relief.

Where one person, by a voluntary instrument, gains a *great advantage* over another, the burden is on the former to show that the transaction is fair and honest; except that gifts or voluntary conveyances between husband and wife are presumed to be made as advancements.

In a suit in chancery to set aside a voluntary conveyance by a husband to his wife and certain contracts made by the husband and wife with her nephew, on the ground of the husband's mental incapacity and of undue influence exercised over him, the master's report examined, and *held* that the facts reported justified his ultimate finding of such mental incapacity and undue influence.

APPEAL IN CHANCERY, Rutland County, March Term, 1905, *Powers*, Chancellor. Heard first on defendant's motion, supported by affidavits, to recommit the master's report. Motion denied. Then heard on bill, answers, and master's report. Decree, "That said deeds, power of attorney, and contracts described in the orator's bill of complaint, be set aside and adjudged to be null and void, and that the personal property, mortgage notes, and other promissory notes and evidences of indebtedness, and all choses in action described in said bill of complaint be, and the same are hereby decreed to the orators, and that said paper writings described in the amendments to said bill of complaint be, and they are hereby set aside and declared to be null and void, and that the said defendants be and are hereby ordered to account forthwith and surrender to the orators all sums of money that may have been collected, or that have come into their hands or possession belonging to the estate of the said John M. Allen, and that the defendants account forthwith, turn over and surrender to the orators the money, personal property, real estate and the proceeds thereof,

and all other property which came into the hands and possession of said Osgood, or of said Barrett and Dana, or either of them, by virtue of said deeds, contract or power of attorney; and also that the contracts said to exist between the said Osgood and Edgar B. Moore be, and the same are set aside for want of authority in said Osgood in respect to property therein mentioned, and that the defendants and each of them be, and they are hereby strictly restrained and enjoined from conveying away, assigning, transferring or encumbering, either by deed, mortgage, contract or otherwise, any of the real estate or personal property in said bill of complaint described, and that the complainants recover of the defendants their costs, and that they have execution therefor." The defendants appealed.

The reporter knows nothing about the affidavits mentioned in the opinion, except what is therein stated. Besides the facts stated in the opinion, the master reported the following: For some years previous to January 13, 1889, John M. Allen and Lucy Jane Allen, his wife, lived upon the farm then owned by him in Rutland, Vt., and which he conveyed to his wife, through Walter C. Dunton, on January 13, 1890, as herein-after stated. John M. Allen died, intestate, November 1, 1893, at the age of 77 years. His wife Lucy Jane, who was a few years his junior, died, testate, February 15, 1892. Her will is dated January 29, 1892, and was probated March 15, 1892. The orators are J. A. Eayres and F. M. Butler and they are the administrators of the estate of said John M. Allen. Defendant Rockwood Barrett, one of the executors named therein, was duly appointed executor of Lucy Jane Allen's will. The other executor named in said will did not qualify, and defendant, Edward Dana, was duly appointed administrator of her estate with the will annexed. Defendant Lee K. Osgood is a nephew of Lucy Jane Allen and one of the legatees named in

her will. On January 13, 1890, W. C. Dunton, a brother-in-law of defendant Barrett, went to the Allen house and drew two deeds, one a warranty deed from John M. Allen to said Dunton of the major part of the latter's home farm in Rutland, and the other a quitclaim deed of the same premises from said Dunton to Lucy Jane Allen. These two deeds were duly executed, and were left on the table at which Mr. Allen sat. Mr. Allen and said Osgood were present when the deeds were drawn and executed. There was no evidence that these deeds or either of them were read to Mr. Allen, or that their contents were explained to him, or that he had previously talked about the matter with anyone. Before the deeds were executed said Osgood brought said Dana to the house, and those two witnessed the signatures of both Dunton and Mr. Allen. The consideration named in the deed from Allen to Dunton was "love and affection and \$100.00," and in the deed from Dunton to Mrs. Allen, "\$100." No actual consideration passed between the parties to either of said defendants. On this same day, January 13, 1890, said Dana—Osgood being present—talked with Mr. and Mrs. Allen about their making a contract with Osgood and giving him a power of attorney. Said Dana then made memoranda, and afterwards drew these papers at his office, and they were both executed February 13, 1890. The contract was signed by Mr. and Mrs. Allen and by said Osgood. The power of attorney was signed by Mr. and Mrs. Allen. The contract was, in part, a lease to Osgood of said home farm, stock and farming tools, except a portion of the land therein described which included the house and about three acres of land around it, and except such farming tools and stock as "said Allen and wife shall need in carrying on said reserved parcel, and shall designate and choose," and except such portion of the barns, until sold, "as they might actually require."

This contract was also an agreement on the part of Mr. and Mrs. Allen to convey by warranty deed to said Osgood, his heirs and assigns, said farm, stock and tools, excepting the reserved parts and rights above mentioned, for the sum of \$13,000, "whenever and as soon as said sum of \$13,000 shall have been paid to said Lucy Jane Allen, her heirs or assigns." Said contract further stipulated that Mr. and Mrs. Allen were to have the proceeds and products of said farm in lieu of interest, unless said Osgood chose to pay interest, and himself take the proceeds and products of the farm. Osgood agreed to carry on the farm in a good husbandlike manner; to keep an accurate account of the expenses in so doing, and to pay over to Lucy Jane Allen yearly the net income therefrom and to make no charge for his services. Said contract gave Osgood the right to lay out streets through said farm, to divide it into lots and to sell the same at such price "as shall be approved by said Allen and wife," and in part payment, to take mortgages exceeding two-thirds of the actual price of such lot or lots if "approved by said Allen and wife," and he was to pay over to said Lucy Jane Allen the receipts from sales, to be "applied towards said sum of thirteen thousand dollars." Said contract further stipulated that Mr. and Mrs. Allen were to execute and deliver to said Osgood a power of attorney so that he could make sales of said lots. Said contract also contained this paragraph:

"And whereas said Osgood is owing said John M. Allen three promissory notes and is owing said Lucy J. Allen one promissory note, which said notes are signed by him, said Osgood, now in consideration of the above agreement it is further mutually agreed that in case said Osgood shall succeed in selling said property for the sum of thirteen thousand dol-

lars and for enough in addition thereto to pay his present indebtedness, other than said four notes, then the excess thereof, if any, shall be applied towards paying the interest due on said four notes on the first day of April, 1890, and if there shall not be sufficient to pay such interest in full, then the balance of such interest due April first, 1890, is to be endorsed and remitted as if paid, and if said Osgood shall not succeed in selling said property for sufficient to pay said sum of thirteen thousand dollars and his present indebtedness, other than said four notes, then all the interest on said four notes, due on the first day of April, 1890, is to be remitted and endorsed as paid."

The power of attorney authorizes Osgood to sign deeds of conveyance and carry out the terms of said contract. Osgood at once took possession of said farm under said contract and power of attorney, together with the stock and other personal property mentioned in said contract. No inventory of this property was made, nor was any value ever placed thereon. Mr. and Mrs. Allen continued to live in the house on said farm until they died. Mr. Allen had a tin trunk in which he kept his papers, and which was deposited in a closet off his bedroom. Mrs. Allen's papers were also kept in this trunk. Shortly after Mrs. Allen's death said Dana was at the Allen house with defendants, Barrett and Osgood, and inquired of Mr. Allen where her papers were. Thereupon the trunk was brought out and Mr. Dana took therefrom said two deeds, certain notes of Osgood to Mr. Allen, said contract, and other papers and securities of Mrs. Allen's and mortgage notes taken for the sale of lots, and carried them to his office.

On February 13, 1890, said Osgood owed Mr. Allen \$3,000, specified in three notes of \$1,000 each, and among the securities which Mr. Dana took from said trunk as aforesaid were these Osgood notes. In the summer of 1893 said Dana

separated the papers of Mr. Allen from the papers of Mrs. Allen, keeping the latter as her administrator, and returned to Mr. Allen, at his request, certain of his papers, including said two deeds and said Osgood notes, which were put into said tin trunk. Said Osgood took these three notes from the Allen house about June 1, 1893. Mr. Allen was then present, but there was no evidence that the notes were handed him by Mr. Allen, or by any other person, or that Mr. Allen then or afterwards knew that they had been taken. About the time that Mr. Allen died Osgood took said tin trunk with its contents to his house and also took some other papers which were found in Mr. Allen's desk.

On March 10, 1890, said Osgood made a contract with one Moore, a real estate agent in Rutland, to divide said farm into lots and sell them, "except the wood lot and three acres around the house"; terms, 5 per cent. on sales up to \$16,000, and after that amount had been sold one-half of the gross receipts. At first said Moore supposed he was making a contract with Mr. and Mrs. Allen, and put their names in a written agreement, but afterwards struck their names out and inserted the name of Lee K. Osgood. Mr. and Mrs. Allen never knew the terms of the Moore-Osgood contract; nor did Moore know the terms of the Allen-Osgood contract. Moore made sales of these lots for prices aggregating more than \$16,000, all of which was paid in cash and in mortgage securities on the several lots sold. Osgood signed the deeds conveying said lots. The mortgages were taken to Lucy J. Allen, and the proceeds paid to her while she lived, and after her death the proceeds from the sales were turned over to said Barrett and Dana.

On May 7, 1889, Mr. Allen had what his friends called "a shock," but what the master finds to have been "a hemorrhage on the right side of the occipital lobe, and a paralysis

of the inner side of both eyes caused by this hemorrhage which produced partial blindness." In a short time his speech became normal and in about six or eight weeks he was able to be about the house and grounds. During the following summer he was quite feeble and did very little work. His death was caused by Bright's disease, and the master reports that, "Bright's disease in its progress tends to weaken and otherwise impair the mental faculties and physical action, and to break down the nervous system; it causes a degeneration of the arteries in all parts of the body. The arteries become brittle and predisposed to hemorrhage." The master further finds: "That the shock which said John M. Allen had on May 7, 1889, seriously and permanently affected his physical health and mental faculties; that from and after that date, and during the remainder of his life, by reason of said shock and its results, and concurrent impairment of his body and mind made by Bright's disease, said John M. Allen was sick in body, weak in will power and intellectual grasp, became childish, was forgetful, and was wholly incompetent rationally to consider, weigh and determine what was for and what was against his interest, or to transact business affairs, the nature, importance and character of which would require the exercise of a sound and disposing mind. That the execution of said deed, dated January 13, 1890, purporting to be a deed of conveyance of certain lands and premises therein described, to said Walter C. Dunton from said John M. Allen, was not the free act and deed of said John M. Allen, and that his signature to said deed was procured by the undue influence and fraud of said Lucy J. Allen and said Lee K. Osgood, and that the writing of his signature to said deed was not the free act and deed of said John M. Allen. That the signature of said John M. Allen to said contract and said power of attorney, both dated February 13, 1890, were procured by

the undue influence and fraud of Lucy Jane Allen and said Lee K. Osgood; that the writing of his signature to said contract and said power of attorney by said John M. Allen, and the pretended execution thereof by him, were not his free act and deed. That on said January 13, 1890, and on said February 13, 1890, and from said first named date through his natural life, said John M. Allen was mentally incapable of properly understanding and comprehending the scope and effect of said deed, and of said contract and said power of attorney, or of entering into any valid contract, deed or conveyance of the magnitude and importance of said deed, and said contract, and said power of attorney."

The bill prays that said Moore-Osgood contract and said power of attorney and said deeds be set aside and declared null and void, and that the defendants account for the money, personal property, real estate, and all other property which came into their possession, by virtue of said contracts.

Butler & Moloney, and *George E. Lawrence* for the orators.

Marville C. Webber and *E. L. Waterman* for the defendants.

A court of chancery will not set aside a conveyance, if the grantor, at the time he executed it, had sufficient understanding to know the nature and consequence of his act; and the burden of proof is on the party seeking to set the conveyance aside. *Morse v. Slason*, 13 Vt. 296; *Day v. Seeley*, 17 Vt. 542; *Mann v. Betterly*, 21 Vt. 326; *Willard v. Dow*, 54 Vt. 188; *Doty v. Hubbard*, 55 Vt. 278; *Stewart v. Flint*, 59 Vt. 144; *King v. Davis*, 60 Vt. 502; *Dennett v. Dennett*, 44 N. H. 538; 5 Am. & Eng. Enc. 426; *Seaver v. Phelps*, 11 Pick. 304; *Howe v.*

Howe, 99 Mass. 88; *Hovey v. Hobson*, 55 Me. 256; *Miller v. Craig*, 36 Ill. 109; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431; *Ramsdell v. Ramsdell*, 128 Mich. 110; *Weller v. Weller*, 112 Ill. 655; *Shea v. Murphy*, 164 Ill. 614; *Bowdoin College v. Merritt*, 75 Fed. 480; *Doe v. Beeson*, 2 Houston (Del.) 246; *Farnsworth v. Nofsinger*, 46 W. Va. 410, 13 Cyc. 738, (b) notes 62-64; 11 Am. & Eng. Enc. 146-147 notes, especially note 1; 25 Am. & Eng. Enc. 992 *et seq.* and note 4.

Influence to be "undue" must be such as to destroy free agency, and to substitute the will of another for that of the person nominally acting. 13 Cyc. 585 (5); 27 Am. & Eng. Enc. 453; *Foster's Exrs. v. Dickerson*, 64 Vt. 233, 265; *Thornton's Exrs. v. Thornton's Heirs*, 39 Vt. 122; *Howe v. Howe*, 99 Mass. 88, 99; *Corbit v. Smith*, 7 Iowa 60; *Sawyer v. White*, 122 Fed. 58.

Where it is objected that the master received improper testimony, advantage thereof may be taken by motion to recommit the report, as well as by exceptions thereto. *Johnson's Admr. v. Dexter*, 37 Vt. 641; *Wilder v. Stanley*, 49 Vt. 105; *Graham v. Stiles*, 38 Vt. 578; *Walton v. Walton's Est.*, 63 Vt. 513.

Execution of a deed in the presence of an attesting witness is evidence of a delivery, even though the deed remains in the grantor's hands. *Moore v. Hazelton*, 9 Allen 102; *Howe v. Howe*, 99 Mass. 88.

MILES, J. The first ground of objection to the action of the court below, is based upon the refusal of that court to recommit the special master's report. This objection cannot avail the defendant, because the recommitment of the report was a matter within the discretion of the chancellor, and no abuse of that discretion appearing, this Court will not review the

action of that court. *Lovejoy v. Churchill*, 29 Vt. 151; *Fuller v. Wright*, 10 Vt. 512-514; *Morse v. Beers*, 51 Vt. 359; *Robinson v. Dodge*, 66 Vt. 595; *Pease v. Stevens*, 74 Vt. 215, and cases cited; *Sowles v. Sartwell*, 76 Vt. 70.

This holding dispenses with the necessity of considering the affidavits furnished with the case, for their only bearing was upon the question of recommittal. The defendants, however, argued to some extent, that they furnish ground for a new trial, because they show that the findings of the master are without the support of evidence. In this, we think the position of the defendants is not well taken, and that the affidavits do show that there was some evidence supporting each finding of the master. Whether such evidence was sufficient to constitute a fair balance upon all the facts reported, we have not considered, as that is unnecessary, in any view of the case, for this Court will not revise or review the master's findings, unless fraud or corruption is shown, when there is evidence to sustain them. *Security Co. v. Bennington M. Association*, 70 Vt. 201-215, and cases cited; *Sargent v. Burton*, 74 Vt. 24-27. If this were not so, the affidavits could not be used for this purpose; because this case is not before us upon a petition for a new trial, but it is an appeal from the action of the court below, and the grounds upon which the defendants seek a reversal are based upon the alleged errors of that court; and neither can they be used to set the report aside on the ground that it was unsupported by evidence; because those affidavits do not disclose all the evidence produced before the master and from which his report is made, so that this Court can say, if the affidavits themselves did not show it, whether there was or was not any such evidence before the master.

The defendants moved the court below for leave to file exceptions to the master's report and rulings excluding evi-

dence, but they do not urge upon us the refusal of the court to grant that motion, as a ground of error, but do urge that we, as a matter of equity, ought to grant it and send down to the court of chancery a mandate to that effect. The case does not show that the master was requested in writing to report any testimony received or rejected by him, and the report does not show that any was received or rejected by him against the objection and exception of the defendants. Unless so requested the master is not obliged to state his decision in admitting or rejecting evidence, and may treat the objection as waived. Sec. 939, V. S.; *Winship v. Waterman*, 56 Vt. 181; *Scofield v. Stoddard*, 58 Vt. 290. Being waived, if they were ever made in fact, they stand as if they had never been made before the master, and not having been taken before the master, they could not be filed with the report in the court of chancery, and hence could not be considered by this Court. Sec. 942, V. S.; *Winship v. Waterman*, *supra*; *Scofield v. Stoddard*, *supra*; *Bruce v. Life Ins. Co.*, 58 Vt. 253; *Baxter, Admr. v. Blodgett et al.*, 63 Vt. 629.

The remaining question presented involves the orator's right to any decree as well as to the decree made, and as none of the testimony is before us, that right must be determined from the facts stated in the report of the special master.

The orators rest their right to the decree rendered upon the claim, that their intestate, John M. Allen, on the 13th day of January, 1890, and from thence to the time of his death, had not sufficient mental capacity to make the contracts and deeds which the defendants claim he then and subsequently made, and which the orators seek to avoid in this suit; and that undue influence was used upon him by the defendants' testatrix and the defendant, Lee K. Osgood, to secure the execution of those deeds and contracts.

The master has found in express terms that John M. Allen, the orators' intestate, was mentally incapable of properly understanding and comprehending the scope and effect of said deeds and contracts or of entering into any valid contracts, deed or conveyance of the magnitude and importance of said deed and said contract and power of attorney, and that the signature of the orator's intestate to the deed, contract and power of attorney was procured by the undue influence of the defendants' testatrix and the defendant, Lee K. Osgood. These were findings upon the questions submitted to the master, and are findings upon the questions on which the orators' right to the decree rendered, rests; and, if there is no legal or equitable objection to the master's findings as stated, the orators are entitled to a decree.

The defendants, however, claim that these findings of the special master are simply legal conclusions and are not findings of fact, and that he has not found any facts which justify him in reporting such conclusions, and that therefore, the finding being upon a mixed question of law and fact, unsupported by other facts, the decree of the court of chancery ought to be reversed and the bill dismissed.

It is true that, at least a part of that finding is upon a mixed question of law and fact. That part of the finding which states that the contract, deed, and power of attorney were procured by the undue influence and fraud of Lucy J. and Lee K., is undoubtedly a finding based upon law and fact. The finding, that orators' intestate "was mentally incapable of properly understanding and comprehending the scope and effect of said deed, contract and power of attorney, or of entering into any valid contract, deed or conveyance of the magnitude and importance of said deed and said contract and power of attorney," is only a finding that the orators' intestate was mentally

incapable of understanding and comprehending what he did when he executed the papers in question and is merely the finding of a fact; but assuming that the entire facts found were findings upon questions of mixed law and fact, this Court would not be justified in reversing the decree and dismissing the bill. While it is the better practice, no doubt, to report all the facts upon which an ultimate finding is based, it is not legal error to omit to do so, even though the finding be a conclusion resulting from mixed questions of law and fact. *Winship v. Waterman*, 56 Vt. 181-185.

This holding entitles the orators to a decree, without considering the question of whether the other facts found show incapacity or fraud and undue influence or both; but in view of the fact, that the defendants claim they do not, and that they are the only foundation upon which the master's ultimate finding of incapacity and undue influence rests, a claim, we think, not supported by the report, we have thought best to consider the case in that view.

It would contribute nothing to the law of the case to enter into an exhaustive analysis and logical arrangement of the reported facts. It is sufficient to call attention to enough of these facts to illustrate the reasons of our conclusions and the application of the law to this and similar cases.

No clear and definite rule can be laid down, defining mental incapacity and undue influence, which will apply in all cases and upon which the court can rely as a foundation for granting or refusing the prayer of a bill to set aside a conveyance alleged to have been made under such influence. Each case, therefore, must, to a certain extent, rest upon its own peculiar circumstances. Some of the principles which enter into all such questions have been settled by adjudication, and among those principles which have been settled in this State, is that which re-

quires the mental incapacity of him on whose account the contract is sought to be set aside, on the sole ground of mental incapacity, to be such as leaves him without understanding to know the consequence of his own act. *Morse v. Slason*, 13 Vt. 296; *Day v. Seeley*, 17 Vt. 542; *Willard v. Dow*, 54 Vt. 188; *Stewart v. Flint*, 59 Vt. 144, and cases cited in the opinion; *Greer v. Greer*, 9 Grattan, 330; *Newhouse v. Goodwin*, 17 Barbour 236; *Brown v. Torrey*, 24 Barbour 583; *Van Alst v. Hunter*, 5 Johns. Ch. 148; *Stuart v. Lispenard*, 26 Wend. 255; *Stone v. Damon*, 12 Mass. 488; *Farman v. Brooks*, 9 Pick. 212. It is equally well settled, that a hard bargain or inadequate consideration, standing alone, does not furnish sufficient ground, under ordinary circumstances, for interference by the court of chancery. *Mann v. Betterly*, 21 Vt. 326; *White & Tudor's Leading Cases in Eq.*, Hare & Wallace's Notes, Vol. III, p. 136; but inadequacy of consideration, coupled with such a degree of mental weakness as would justify the inference that an advantage had been taken of that weakness, will furnish sufficient ground for equitable interference. *Mann v. Betterly*, *supra*. The rule is well stated in *White & Tudor's Leading Cases in Equity*, Vol. III, p. 136, wherein it is said: "A chancellor will not, therefore, interfere under ordinary circumstances, on the ground of mental weakness or of inadequacy of consideration, so long as either stand alone; and there is no reason for supposing that one has led to, or resulted in the other. When, however, both these elements are present, the case changes its aspect, and there will be ground for an inference that the inadequacy is due to the exercise of undue influence, or that undue advantage has been taken of the weakness, and equity will set the whole transaction aside, unless this presumption is rebutted." After citing authorities, the author proceeds to say: "Hence, while proof that the powers of one of

the parties to a contract were changed or enfeebled, may be nothing in itself," citing authorities, among which is *Mann v. Betterly, supra*, "it will be everything when the bargain is one that no man, in the full possession of his faculties, would have made, and that no man should have made with another who had lost the power of taking care of himself." To this statement of law he cites a large number of cases, among which are again cited *Mann v. Betterly, supra*, and *Conant v. Jackson*, 16 Vt. 335. He also states the rule on p. 122 of the same volume, to be as follows: "In the absence of any special relation between the parties, where a party *gains a great advantage over* another, by a voluntary instrument, the burden of proof is undoubtedly thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction is fair and honest." To this proposition of law the author again cites a long list of authorities.

These rules, however, are somewhat modified in case of a gift or advantageous contract to a wife, and while the authorities are not harmonious in this regard, the weight of authority seems to support this modification. *White & Tudor's Leading Cases in Equity*, Vol. III, p. 144. The modification simply consists in requiring the party setting up incompetency and undue influence, to prove it, notwithstanding that the contract was for the benefit of the wife and rested upon an inadequate consideration, if the case was otherwise free from suspicion, the presumption being that it was an advancement to the wife.

Now, applying these general and elementary rules of law to the facts reported by the master, can we say that there are no reported facts supporting the master's finding of incapacity and undue influence?

To begin with, the master has reported that at the time the contracts were made, the orators' intestate was an old man

seventy-four years of age, afflicted with Bright's disease, who had received a severe shock about eight months before the papers in question were made, rendering him partially blind, weak in will power and intellectual grasp, who was childish, forgetful, wholly incompetent rationally to consider, weigh and determine what was for or against his interest, and who was wholly incompetent to transact business affairs requiring the exercise of a sound and disposing mind, and who usually had an attendant when he went outside the house, and, at the time the papers were made, was surrounded by the relatives of the wife and the persons to be benefited by the contract, who advised concerning and composed the terms of the contract, with none of his relatives present, conveying away over thirteen thousand dollars of his property without any consideration whatever or any valid reason shown why he made the contract, leaving him destitute of all property, except three notes of one thousand dollars each against the defendant Osgood, which he afterwards gave to said Osgood, so that at the time of his death, Nov. 1, 1893, his estate inventoried only \$371.40, being insufficient to pay his outstanding debts, costs of administration and funeral expenses. As we look into the contracts made at that time, which constitute a part of the report, we can hardly find a paragraph made in the interest of John M. The power of attorney from John M. and Lucy J. to Lee K. gives him full and unlimited power to sell and dispose of that property as he sees fit and for such sum as he may fix, and the proceeds thereof receive to himself, taking from him no security, notwithstanding that he then owed John M. and Lucy J. more than three thousand dollars of unsecured indebtedness.

We might proceed farther in the statement of additional facts found by the master; but enough has been already enumerated to justify him in finding his ultimate facts of incapacity

and undue influence as applied to the well settled principles of law.

The holding of this Court in *Mann v. Betterly*, 21 Vt. 326, *supra*, is a far stronger holding than is required to be made in the case at bar. There the mental capacity was stated to be "of weak understanding and capacity for the transaction of business; that in point of intellect he was not upon an equality with mankind in general." The Court says in reference to this, that such imbecility alone is not sufficient; but "when coupled with gross inequality in the contract, may be sufficient to justify the inference of fraud and imposition"; and then goes on to consider whether there was gross inadequacy of consideration, not finding it, the bill is dismissed; but the case clearly shows that if the court had found that fact, it would have sustained the bill.

In the case at bar, the mental capacity is found to be much lower than in the case cited and the contract is without any consideration whatever. This in itself, without alluding to the many other facts found indicating undue advantage, under the rule laid down in *Mann v. Betterly*, *supra*, is sufficient to sustain the bill, in view of the fact that nothing appears in the report to rebut the presumption of incapacity and undue influence combined. The deeds and contracts themselves, showing that John M. gained nothing by them and lost everything, with the surrounding circumstances, called for clear reasons for making them; but no facts are found by the master why they were made, except the incapacity and undue influence. These conclusions are not affected by the fact that the deed was to the wife, for that fact only affects the question of upon whom the burden of proof lies, the presumption, in case of a wife, being that it was made as an advancement. *White & Tudor's Leading Cases in Eq.*, Vol. III, p. 144; but in this case, that pre-

sumption is rebutted by the facts found, from which it clearly appears that the conveyance was made for the purpose of divesting the heirs of John M. of all chance to inherit any of his property, and to place it in the wife so it would ultimately pass to her heirs.

Decree affirmed so far as the same relates to real and personal property now in the possession of the defendants or either of them, or to which they or either of them are entitled, embraced or described in said contract, deeds and power of attorney, and claimed by said defendants by, through or on account of the same; and so far as the same relates to an accounting by the said defendants and the surrender to the orators of all sums of money that may have been collected by said defendants or either of them, or that have come into their hands or possession, belonging to the estate of said John M. and so far as relates to the surrender to the orators of all kinds of property that came into the possession of the said Osgood, Barrett and Dana under and by virtue of said deeds, contract and power of attorney and which they have not disposed of to bona fide purchasers without notice; and so far as the same relates to the contract between said Osgood and said Moore remaining unexecuted at the time the bill in this cause was brought; and so far as the same relates to the injunction; but the same is reversed so far as it relates to real and personal property conveyed by the said Osgood, Dana, Barrett and Moore to bona fide purchasers without notice; and the cause is remanded with mandate to the court of chancery to refer the same to a master to take an account of the property, whether real, personal or mixed, which has come to the hands and possession of the defendants or either of them from the estate of the said John M. Allen, by virtue of a claim of right resting upon said contract, deeds and power of attorney, and also to take an account of

all money which said defendants or either of them have received from the sale of any and all such property or which they or either of them may have received on account thereof, and to report to said court of chancery the location and value of said property and the amount of money, if any, which they or either of them have received from the sale of any of said property, whether sold by themselves or by their agent, and, if it shall be found that sales have been made and money received therefor, to report to whom and for how much the sale was made and whether to a bona fide purchaser with notice or otherwise, and when said report is made and returned to said court of chancery, such decree is to be entered thereon, in addition to the decree already rendered and affirmed herein, as the facts reported warrant.

R. A. ORDWAY v. ISRAEL T. FARROW.

May Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, POWERS, and MILES, JJ.

Opinion filed October 29, 1906.

Equity—Bill to Redeem—Conditional Deed of Timber—Effect in Equity—Respective Rights of Parties After Condition Broken—Effect of Tender in Full After Condition Broken—Questionable Conduct of Grantor—Suits at Law—Injunction—Interest—Mortgages.

It is a fundamental principle of equity jurisprudence that a person having a legal right shall not be permitted to use it to accomplish injustice.

In a suit in equity to redeem, it appeared that on December 17, 1900, the defendant conveyed to the orator all the timber on a certain lot, by a deed conditioned for the payment of the orator's note, due June 6, 1901, for a portion of the purchase money, and that the timber be removed within three years. The orator entered and removed some of the timber, but failed to pay the note at its maturity. On September 11, 1901, the orator made defendant a tender, which has since been kept good, of the amount then due, which the orator refused, saying that he had sold the property too cheap and wanted it back, claiming that the orator had forfeited all his rights by his default in payment. Subsequently the defendant notified the orator not to cut any more logs on the lot, and brought two suits at law against him for cutting thereon, both of which are still pending, one of them in the Supreme Court on the orator's exceptions. *Held*, that said conditions are conditions subsequent, and that the relation created between the parties, except as to the removal of the timber, does not differ in legal effect from that created by the ordinary conveyance of an absolute title with mortgage back to secure a portion of the purchase money.

Although the orator failed to pay the note at its maturity, and the legal estate thereby became vested in the defendant, the orator still had the equitable right to redeem, which right the defendant was bound to respect.

The forfeiture consequent on the orator's default of payment was designed merely as security for the enforcement of the obligation secured by the mortgage, and equity will require that it be not perverted to a different and oppressive purpose; and since it clearly appears that said suits at law, having been begun since said tender, were not brought either to enforce or to protect the security, the defendant will be perpetually enjoined from the further prosecution thereof and from availing himself of any advantage gained thereby.

Since the orator's equitable right of redemption could neither be heard nor determined in the suits at law, he cannot be barred of that right either by contesting those suits or by an adverse judgment therein.

By defendant's refusal of the tender and the retention of the legal title consequent thereon, the cutting of more timber by the orator was made a trespass at common law.

Regularly, when a grantor will take advantage of a condition broken, if he may enter, he must enter; and when he cannot enter, he must make claim, for a freehold and inheritance shall not cease without entry or claim.

But here, the conditional estate was so related to the fee that actual entry by the defendant for the breach could not be made; and if a claim was necessary, it was made when the defendant asserted a forfeiture and forbade the orator cutting any more timber.

Defendant's refusal of the tender, and his subsequent action in claiming absolute ownership, with notice to the orator to cut no more logs on the lot, and the bringing of the suits at law for such cutting, place the defendant in the position of a mortgagee in possession holding adversely to the equitable right of the mortgagor; and, in the circumstances, such adverse holding was inequitable, oppressive, and in derogation of the orator's rights.

It is a general rule of the common law that if a condition subsequent be possible at the time when it was created, and afterwards became impossible by the act of the grantor, the estate of the grantee, being vested, is not thereby divested, but becomes absolute.

As the application of the above common law rule to this case would give the orator an unconditional title to the standing timber, which might work injustice to the defendant; and since the orator was prevented by the defendant from performing within the time limited, equity will regard the condition as without any specified time within which the timber should be removed, in which event the performance must be within a reasonable time; and it is left to the court of chancery to determine what constitutes a reasonable time in the circumstances.

Since the basis of the defendant's refusal to accept the tender is inequitable and unjust, he shall have no interest since the tender was made.

APPEAL IN CHANCERY. Heard on bill, answer, and master's report at the December Term, Caledonia County, 1905, *Munson*, Chancellor. Decree, "That the course taken by the orator—with full knowledge of all the matters affecting his rights—in submitting to a trial at law, taking the case to the Supreme Court, having the case continued there, and deferring the bringing of the bill until the case was about to

be heard, disentitles him to equitable relief; and it is therefore ordered and decreed that the bill be dismissed with costs." The defendant appealed.

On November 3, 1900, by a verbal agreement the orator agreed to buy, and the defendant agreed to sell to him, the standing timber on a certain lot in Walden, Vt., for \$100, and the orator then paid defendant \$5.00 on the purchase price and took from him a receipt reciting that fact. The orator had no great financial means, and he expected to cut and manufacture the timber on this and other lots and sell the same, and from the proceeds to pay the defendant, and the defendant understood this. On December 6, 1900, the orator gave defendant his six months promissory note for \$95, the remainder of the purchase money. To this note was attached the following written memorandum signed by the orator:

"The above note is given for the balance of the purchase money for the standing timber on what is known as the Fletcher lot lying and situated at the north of Coles Pond in Walden, Vt. Said lot now belonging to said Israel T. Farrow, Jr. Said timber is to be and remain the property of said Israel T. Farrow, Jr., till above note and interest are paid in full."

After the above note was given, defendant was informed that such a note would not serve to hold the timber on the lot, and on December 17, 1900, he executed and delivered to the orator a deed, dated December 6, 1900, conveying to him the timber on said lot. This deed was conditioned as follows: "The condition of this deed is such, that if the said R. A. Ordway, his heirs or assigns shall well and truly pay or cause to be paid the said I. T. Farrow, Jr., his heirs or assigns one promissory note of even date herewith for the sum of \$95, payable six months from date to Israel T. Farrow, Jr., with

interest from date and signed by said R. A. Ordway, and shall remove said timber within three years, then this deed shall remain in full force and effect but otherwise this deed to be null and void."

The orator took possession of the lot by doing some cutting thereon before December 6, 1900, and erected his mill near by, but did not get it into operation so soon as he expected, although he used reasonable efforts to do so, and in consequence he did not get the timber from the lot manufactured and sold so as to pay the note when it became due, July 6, 1901. On August 29, 1901, the parties met, and defendant then for the first time claimed that the orator had forfeited all his rights to the timber because he had not paid the note at its maturity, and forbade him to cut any more timber. Then followed the tender and the two suits mentioned in the opinion.

J. P. Lamson for the orator.

Porter & Thompson for the defendant.

A judgment against the orator in a suit at law, if insisted upon by the defendant, constitutes a conclusive bar in chancery. *St. Johnsbury v. Bagley*, 48 Vt. 76; *Burton v. Wiley*, 26 Vt. 430; *Briggs v. Shaw*, 15 Vt. 78; *Emerson v. Udell*, 13 Vt. 477; *Hempstead v. Watkins*, 42 Am. Dec. 696; *Haughy v. Strang*, 27 Am. Dec. 648; *Morrison v. Hart*, 4 Am. Dec. 663.

WATSON, J. By the defendant's conveyance of the timber, an estate was created and vested in the orator, the continuance of which depended upon the performance of the conditions, first, to pay the note described in the deed, and secondly, to

remove the timber within three years. These are conditions subsequent,—Shep. Touch. 117; 4 Kent Com. 125,—and exclusive of the second, the relation created between the parties does not differ in legal effect from the ordinary case of conveyance of absolute title with mortgage back to secure a portion of the purchase money. *Moulthrop v. Farmer's Mu. Fire Ins. Co.*, 52 Vt. 123; *Ford v. Steele*, 54 Vt. 562.

So far, the case is like a common action in equity to redeem. Standing thus, the right of redemption is too clear to necessitate the citation of authorities. It is contended, however, that this right is barred by the judgment in the first suit at law. But that action was trespass and trover for cutting down and converting the timber, and the judgment was in damages for the stumpage value of the lumber cut after the legal title, by non-payment of the mortgage debt, became absolute in the defendant as mortgagee. The question of the equitable right of redemption could neither be heard nor determined in that action. Consequently this right can be barred neither by contesting the suit nor by the judgment.

It is said that redemption cannot avail the orator except he be granted time in which to remove the timber beyond the contractual limitation which has expired. Hereon it is argued that the exercise by the defendant of his legal right to bring suits at law against the orator should not afford the latter an excuse for the non-performance of the condition in respect to the time in which the timber should be removed; and that the defendant should not be required to give further time, thereby having forced upon him a contract to which he never subscribed or assented. But upon the facts found this is no answer to the orator's claim for relief in equity. Notwithstanding the note was overdue and so the law-day of the mortgage passed, the orator had the equitable right to redeem by paying the sum

due with interest, which right the defendant was bound to respect.

On September 11, 1901, when the mortgage note was some more than three months overdue, and before any suit had been brought, the orator tendered to the defendant the amount then due, which the defendant refused to receive, claiming that he had sold the timber too cheap and did not want the pay, but wanted the property back, and that the orator had forfeited all right to it. And he claimed at the hearing before the master that the reason he did not accept the tender was because the timber had advanced in value, that he sold it too cheap, and wanted it back with pay for the stumpage of that which had been cut. The tender has been kept good. In equity ever after the tender was made, the defendant and not the orator was in default. Yet on June 26, 1902, the defendant brought his suit at law against the orator for trespass upon the freehold in cutting the timber, with a count in trover for a subsequent conversion of the timber cut. Pending that suit in the county court, and on November 20, 1901, the defendant by his attorneys notified the orator in writing not to cut any more logs or lumber on the lot in question, and not to sell or remove from the orator's millyard any of the logs or boards which had previously been cut on the lot, as the defendant claimed them all. The defendant prosecuted the suit to judgment in his favor at the following December term of county court. Exceptions were taken by the orator and the cause passed to this Court, where it is still pending. On July 24, 1903, the defendant brought another suit at law for trespass on the lot after the date of the writ in the first suit. This second action was pending at the time this bill was brought and is yet. The orator continued to cut timber until the trial of the first case in the county court, since which time he has done

no cutting. The time limited by the deed for removing the timber expired December 17, 1903. The master finds that there is now upon the lot two hundred thousand feet or more of timber which has not been cut, but which would have been cut by the orator within the time limited if the trespass suits had not been brought.

It is true as urged in argument that after forfeiture by default of payment at the time appointed, and after the tender was made, the legal estate was in the defendant and he had a legal right to bring and prosecute the suits at law. Nevertheless the forfeiture consequent on such default was designed merely as security for the enforcement of the obligation secured by the mortgage, and well settled principles of equity required that it be not perverted to a different and oppressive purpose. "Where a penalty or forfeiture," says Mr. Justice Story, "is designed merely as security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party, having a legal right, shall not be permitted to avail himself of it for the purpose of injustice, or fraud, or oppression, or harsh and vindictive injury." 2 Story Eq. Jur. §1316.

The principles here enunciated apply with great force to the case in hand. Although at law the legal estate became absolutely vested in the mortgagee upon default, in equity the mortgage is a mere security for the debt, and only a chattel interest, and until a decree of foreclosure, the mortgagor continues the real owner of the fee. The legal title vests in the mortgagee merely for the protection of his interest, and in order to give him the full benefit of the security; but for other

purposes the mortgage is a mere security for the debt, and since default the mortgagor has had a right to redeem, which may be enforced in equity. "A mortgage is one thing at law and another in equity; in the one court it is an estate, and in the other a security only. * * Courts of law have so far adopted the principles of equity that they allow the legal title of the holder of the mortgage to be used only for the purpose of securing his equitable rights under it." 1 Jones Mort. sec. 11; 4 Kent Com. 11th ed. 173-177; *Barrett v. Sargeant*, 18 Vt. 365; *Hooper v. Wilson*, 12 Vt. 695. Lord Eldon said, at law a mortgagee is under no obligation to re-convey after the particular day of limitation, yet a court of equity says that though the money is not paid at the time stipulated, if paid with interest at the time a re-conveyance is demanded, there shall be a re-conveyance, upon the ground that the contract is considered in equity, as a mere loan of money, secured by a pledge of the estate; that the agreement does not import at law once a mortgage, always a mortgage, but equity says that. *Seton v. Slade*, 7 Ves. 265.

Before forfeiture on the mortgage, the orator was in possession of the lot to the extent necessary for the purpose of his grant. Other than this, the possession remained in the defendant, as owner of the fee. Regularly when a grantor will take advantage of a condition, if he may enter he must enter, and when he cannot enter he must make claim, for the reason that a freehold and inheritance shall not cease without entry or claim. But if the grantor is himself in possession of the premises when the breach happens, the estate reverts in him at once without any formal act on his part, and he will be presumed, after breach, to hold for the purpose of enforcing the forfeiture unless he waive the breach, which he may do. Co. Litt. 218, a; 1 Washb. Real Prop. * 452. The conditional

estate was so related to the fee that actual entry could not be made. Whether in the circumstances it was necessary for the defendant to make claim in consequence of the breach, we need not consider; for if the defendant's possession of the fee was equivalent to his re-entry, it was sufficient in law; and in case a claim be necessary, it was made when the defendant asserted a forfeiture and forbade the orator's cutting more timber. Let it be either way, an equivalent to a re-entry was had, and thenceforth the possession was in the defendant. But his possession has been in a sense in trust for the orator. Lord Hardwicke said, "it is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance he certainly is, till foreclosure." *Casborne v. Scarfe*, 1 Atk. 603. See also *Dobson v. Land*, 8 Hare, 216; *Amhurst v. Dawling*, 2 Vern. 401.

It clearly appears from the facts found that the suits at law were not brought either to enforce or to protect the security. No occasion existed to bring them for such purpose, for the full amount of the mortgage note had been tendered the defendant, the tender had been kept good, and the money was subject to his call whenever he saw fit to take it. The refusal of the tender on the grounds stated, and the defendant's subsequent actions in claiming absolute ownership of the lumber with notice to the orator to cut no more logs on the lot, in bringing the suits for trespass on the freehold and obtaining judgment for damages in cutting timber after the tender was made, place the defendant in the position of a mortgagee in possession holding adversely to the equitable rights of the mortgagor, rather than in recognition of them, or in any sense in trust for him. In view of the condition in the deed making the orator's estate defeasible if the timber be not removed within the time specified, such adverse holding by the defend-

ant was inequitable, oppressive, and in derogation of the orator's rights in that respect. It is laid down by Sheppard that if a feoffer, after a feoffment of land made upon condition, enter and hold the possession only, by this the condition is suspended during his possession; and if he hold the possession so long that the feoffee cannot perform the condition, the condition is discharged forever. 1 Shep. Touch. * 158.

Moreover, by the refusal of the tender and the retention of the legal title consequent thereon, the cutting of more timber by the orator was made unlawful. This was established by the judgment against him in the suit at law for trespass in entering upon the land for that purpose, upon the recovery of which he ceased cutting. The removal of the timber within the time limited was therefore made impossible by the unconscionable actions of the defendant. "We can do that only which we can lawfully do" is a maxim here applicable. It is a general rule of the common law that if the condition subsequent be possible at the time when it was created, and becomes afterwards impossible by the act of the grantor, the estate of the grantee being once vested, is not thereby divested, but becomes absolute. After stating this rule, it is said by Lord Coke by way of illustration: "If a man make a feoffment in fee upon condition that the feoffee shall re-enfeoffe him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that I. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regu-

larly true in all cases." Co. Litt. 206, b. Upon the same doctrine Bacon says, "So, if a condition be to repair a house, he is excused thereof, if a stranger, by the command of the obligee himself, disturbs him, and will not suffer him to do it." Bac. Abr. tit. Conditions, (Q) 3. In 2 Greenleaf's Cruise, tit. 13, ch. 2. sec. 21, 22, the same rule is laid down, with a statement of the holding in *Darley v. Langworthy*, 3 Bro. Parl. Ca. 359, where Vincent Darley devised his estate, called Battins, to his sister for life. He also gave her the rents and profits of all his chattel estates for so many years as she should live, and she should choose to reside at Battins. The devise of the estate of Battins was afterwards revoked by the testator. It was held that the devisee was entitled to the benefit of the chattel estates, discharged from the condition of living at Battins, which the revocation had put out of her power. Lord Comyns says that he who prevents the performance of a condition cannot avail himself of the non-performance. Com. Dig. tit. Condition, (L 6). See also Bac. Abr. (o) 3; 4 Kent Com. 130; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *United States v. Arrendono*, 6 Pet. 691, 8 L. ed. 547; *Whitney v. Spencer*, 4 Cow. 39.

The application of the above rule at law, without modification, to the case before us would give the orator an unconditional title to the standing timber with no limitation as to time for its removal, other than that implied by law, an estate not contemplated by the parties and one which might work injustice to the defendant. The orator's estate created by contract was conditioned upon the removal of the timber, and its character in this respect will not be changed by a court of equity. But since the orator was prevented by the defendant from performing within the time limited, he will be relieved in equity from the forfeiture consequent thereon, and as far as

circumstances will admit, the parties will be restored to their original position under the contract. To this end equity will regard the condition as without any specified time in which the timber should be removed. And where no particular time is specified in which the condition shall be performed, the rule is that the performance must be within a reasonable time, according to the nature of the thing to be done. Com. Dig. tit. Condition, G. 5. In *Davis v. Gray* the non-performance of conditions subsequent within the time fixed because prevented by the State, was involved, and similar relief was granted in equity. See also *Battell v. Matot*, 58 Vt. 271. What will constitute a reasonable time in the circumstances of the case, however, will be left for the court of chancery to determine. No question is made but that the bill is sufficient for this purpose.

The question arises as to what effect the tender and its refusal have on the right of the defendant to subsequent interest. In England by a custom which, as affecting the claim for interest, has the force of law a mortgagee whose money is not paid on the day appointed is entitled to six months' notice from the mortgagor of his intention to pay off the mortgage, unless it be paid pursuant to a demand by the mortgagee, or an agreement entered into that it should be paid on a particular day. Consequently a tender before the expiration of the six months will not stop the running of interest during that time. The foundation of this custom seems to be that since redemption is a matter of equity only, a person seeking to redeem should do equity by allowing the mortgagee a reasonable opportunity to find other security on which to invest his money when he receives it. 2 Spence, Eq. 651; *Browne v. Lockhart*, 10 Sim. 421; Jones, Mort. sec. 1071.

But it is said by Mr. Jones that there is no such rule or custom in this country. Sec. 890, 1071. Certainly none obtains in this State. Notwithstanding the money was not paid or tendered on the day appointed, the orator had the right to redeem by payment or tender of payment subsequent thereto and at the time when he in fact made the tender, and the defendant should have accepted it. The defendant refused to receive the money and since that time he has been wholly in default,—the basis of his refusal is inequitable and unjust. In these circumstances he cannot in conscience have interest after the tender was made. *Blodgett v. Blodgett*, 48 Vt. 32; 2 Spence, Eq. 651; *Manning v. Burges*, Freem. ch. 174; *Lutton v. Rodd*, 2 ch. cas. 206; *Wiltshire v. Smith*, 3 Atk. 89.

Enough has already been said touching the purpose and effect of the suits at law to show that defendant should not be allowed to prosecute them further, or to avail himself of any advantage gained by them. "The court interferes on the principle of preventing a legal right from being enforced in an inequitable manner, or for an inequitable purpose." Set. Decr. 1st Am. ed. 161. It is laid down as a general proposition, "that in all cases where, by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained; * * *. If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will, in like manner, control the judgment, and restore the injured party to his original rights." 2 Story Eq. Jur. sec. 885; *Taylor v. Gilman*, 25 Vt. 411.

Decree reversed and cause remanded with mandate.

FREDERICK J. WHITE v. THE LUMIERE NORTH AMERICAN
COMPANY, LIMITED.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed October 29, 1906.

*Master and Servant—Construction of Executory Contract of
Employment—Wrongful Dismissal of Servant—Result-
ing Rights of Servant—Evidence—Construction of Series
of Letters—Question for Jury—Exceptions to Charge—
Too General.*

Where one party to an executory contract prevents its performance, or puts it out of his power to perform on his part, the other party may treat the contract as thereby terminated, and sue immediately for whatever damage he has suffered thereby.

In assumpsit for breach of an executory contract, it appeared that on September 5, 1901, by a written contract, defendant employed plaintiff in its business for the term of five years from that date at an agreed annual salary; that plaintiff immediately entered upon said employment and served therein to the satisfaction of defendant till October 15, 1903, when he received notice from defendant that it had leased and transferred to another corporation, for a period extending beyond the limit of plaintiff's employment, all its plant, assets, and business, including its right to plaintiff's services, and that the lessee would not immediately need plaintiff's services, but would continue to pay him his salary "on the sole condition" that he should hold himself subject to the lessee's orders, and requesting him to cancel the powers with which he had been intrusted so as to "leave the field absolutely free" for said lessee. Thereupon plaintiff treated his contract as terminated, and on October 19, 1903, began this suit. *Held*, that defendant's conduct amounted to a dismissal of plaintiff without cause, entitling him to bring immediate action for breach of his contract of employment.

It is of the essence of said contract of employment that defendant should keep plaintiff in its service for the agreed term; and to

this extent, at least, it was bound to perform, even if it was not also bound to keep plaintiff supplied with work during that period. Defendant had the power to thus dismiss plaintiff without cause, thereby subjecting itself to the consequences of a violation of its contract; and after notice of his discharge, plaintiff was not at liberty to disregard his dismissal by continuing his labor and claiming pay for it.

Hence, a written statement showing cash advanced by plaintiff after he received notice of his discharge, and purporting to have been settled with the representative of said lessee, and which was offered in evidence by defendant as tending to show that plaintiff was then acting for it, was immaterial and was properly excluded.

Evidence examined and held that whether plaintiff so assented to said lease during its negotiation as to preclude him from relying upon it as a breach of his contract of employment is a question which was properly submitted to the jury.

Ordinarily, the construction of written correspondence is for the court; but where the case turns upon the proper conclusion to be drawn from a series of letters taken in connection with other facts and circumstances, the question may be properly submitted to the jury.

Where defendant made a large number of requests to charge, and excepted "to the failure to charge as requested, in so far as there may have been an omission to charge as requested, and to the charge as given upon these points on those several requests," such exceptions are qualified and too general to be considered.

SPECIAL ASSUMPSIT by a servant against his master for breach of an executory contract of employment. Plea, the general issue with notice. Trial by jury at the September Term, 1904, Chittenden County, *Powers, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

Powell & Powell, and *W. L. Burnap* for the defendant.

The lease by defendant of its plant, business, and assets was not a breach of its contract with the plaintiff. A renunciation of a contract must be entire, distinct, absolute and une-

quivocal, and must go to the essence. *Vittum v. Estey*, 67 Vt. 158; 9 Cyc. 363; Harriman, Contracts, §521; *Rioux v. Ryegate Brick Co.*, 72 Vt. 148.

By the making of the lease, defendant did not put it out of its power to perform. *Turner v. Sawdon Co.*, 2 K. B. D. 653; *Aspdin v. Auston*, 5 Q. B. 671; *Dunn v. Sayles*, 5 Q. B. 685; *Emmens v. Elderton*, 4 House of Lords, 664; *Clark v. Marsiglia*, 43 Am. Dec. 671; *Rhodes v. Forward*, 1 Appeals 257; *Clark*, Contracts, 647; *Stone v. Bancroft*, 112 Cal. 652; *Sands v. Potter*, 165 Ill. 397, 56 Am. St. Rep. 253; *Decamp v. Hewitt*, 43 Am. Dec. 209; *Lovering v. Lovering*, 13 N. H. 513; *Hopkins v. Young*, 11 Mass. 302; *Frost v. Clarkson*, 7 Cow. 24; 9 Cyc. 640 and notes; *Fitzgerald v. Grand Trunk Ry.*, 63 Vt. 169.

It is well settled in this State that the construction of written correspondence is for the court. *Gove v. Harrinton*, 59 Vt. 139; *Currier v. Robinson*, 61 Vt. 139; *Granite Co. v. Mulliken*, 66 Vt. 465; *Blaisdell v. Dorn*, 72 Vt. 295; *Smith Woolen Machine Co. v. Holden*, 73 Vt. 396; *Davis v. Bowers Granite Co.*, 75 Vt. 291.

V. A. Bullard and R. E. Brown for the plaintiff.

Where one party to an executory contract prevents performance, or puts it out of his power to perform on his part the other party may treat the contract as thereby terminated, and sue immediately for his damage. *Lovelock v. Franklyn*, 8 Q. B. 371; *Ford v. Tilley*, 6 Barn. & C. 325; *Bowdell v. Parsons*, 10 East 359; *Crist v. Armour*, 34 Barb. (N. Y.) 378; *Short v. Stone*, 8 Q. B. 358; *Sheehan v. Barry*, 27 Mich. 217; *Crabtree v. Messersmith*, 19 Iowa 179; *Hawley v. Keeler*, 53 N. Y. 114; *Smith v. Jordon*, 13 Minn. 246; *Wolf v. Marsh*,

54 Cal. 228; *Newcomb v. Brackett*, 16 Mass. 161; *Delameter v. Miller*, 1 Cow. (N. Y.) 75; *Bassett v. Bassett*, 55 Me. 127; *Shaffner v. Killian*, 7 Ill. App. 620; *Boyle v. Guysinger*, 12 Ind. 273; *Hart v. Summers*, 38 Mich. 399; *Branson v. Oregonian R. Co.*, 10 Ore. 278; *Synge v. Synge*, (1894) 1 Q. B. 466.

Defendant by the lease of all its plant, business, and assets for a period extending beyond the limit of plaintiff's employment, put it out of its power to perform and thereby absolutely terminated the contract. *Planche v. Colburn*, 8 Bing. 14; *Woolner v. Hill*, 93 N. Y. 576; *Lovell v. Ins. Co.*, 111 U. S. 264; *Chicago v. Tilley*, 103 U. S. 146; *Hinchley v. Steel Co.*, 121 U. S. 264; *W. U. Tel. Co. v. Semmes*, 73 Md. 9; *Seipel v. Ins. Co.*, 84 Pa. St. 47.

Defendant had the power to cancel the contract, thereby subjecting itself to damage to plaintiff. *Danforth v. Walker*, 37 Vt. 239; *Derby v. Johnson*, 21 Vt. 17; *Nye v. Taggart*, 40 Vt. 29.

WATSON, J. The contract in question, dated September 5, 1901, was entered into by the defendant as the party of the first part, and by the plaintiff as the party of the second part. It contains clauses material in this case as follows: (1) "The party of the first part hereby agrees and doth hereby employ the party of the second part for the period of five years from the date hereof as a permanent member of its advisory or executive board of directors in America and also to supervise and protect the interests and business generally of the party of the first part." (2) "As remuneration for the said services the party of the first part agrees to pay the party of the second part an annual salary of four thousand eight hundred dollars

per year for the first three years of this agreement and the fourth year an annual salary of six thousand dollars per year, and the fifth year an annual salary of seven thousand two hundred dollars, the above mentioned salary and remuneration to be paid to the party of the second part in monthly installments on the first of each and every month, exclusive of expenses," etc. (3) "In consideration of the agreement of the party of the first part the party of the second part hereby undertakes and agrees to devote his entire time for the above mentioned period of five years in the service of the party of the first part as a permanent member of the advisory or executive board of directors aforesaid and in the protection, supervision and conduct of the business generally of the party of the first part, to the best of his ability."

The defendant is an English company organized under the laws of the Kingdom of Great Britain, with its principal office in the city of London. The purpose and object of the company was to acquire the right to manufacture, exploit, and sell photographic dry plates produced by what is known as the Lumiere process. This process was controlled by what is called here the French Company. The latter company was the promoter of the English Company and the owner of more than half of its capital stock. The defendant's plant, located at Burlington in this State, was completed and ready for occupation in February, 1903, and the defendant had notice thereof from the plaintiff who in all respects faithfully and to the defendant's satisfaction performed his part of the contract up to and including the 15th day of October, 1903, when he received notice from the defendant that its entire plant and property, real and personal, at Burlington, had been leased to the French Company and had passed into its hands for a period exceeding the unexpired portion of the plaintiff's term of em-

ployment. Notice of this fact was by letter dated, London, October 7, 1903, in which the defendant further stated that the French Company intended to conduct the business themselves in accordance with their own ideas with the staff which they were sending from Lyons for that purpose and which they considered was sufficient for the initiatory period and for the training of the staff, etc. And "Under those circumstances, the mission which has been entrusted to you for the construction of the manufactory being terminated, and the position which had been reserved for you as a member of the advisory board not having to be filled during a period, the duration of which it is impossible to foresee, we beg you to cancel the powers with which you have been entrusted and which will now be unnecessary, and to leave the field absolutely free to the staff delegated by Messrs. Lumiere, which will arrive at Burlington on the 19th October, and to furnish to this staff all the means of organizing the business in accordance with the instructions which it has received from Messrs. Lumiere. The Lumiere Society will, of course, continue to pay you your salary on the sole condition on your side to remain at its entire disposition, in case, in the future, they should think proper to make use of your business experience in America, and of your high commercial ability. If you should not be disposed to accept such a proposition which will oblige you to remain without occupation at Burlington, and if you should desire to be at liberty to employ your energies in another business, we should be quite disposed to discuss with you any proposals for rescinding the agreement with the Societe Lumiere et Fils, who have now the entire control of our affairs, which agreement has still three years to run." The plaintiff did not accept a position with the French company under the terms mentioned in the foregoing letter,

and on the 19th day of October, 1903, this suit was commenced against the defendant for breach of contract. During the introduction of evidence the court below held as a matter of law that this letter was not in itself such an essential breach of the contract as warranted the plaintiff in treating the contract as having been terminated thereby. An exception was taken by the plaintiff to this ruling but it is not for consideration, since the case is here only on questions saved by the defendant.

At the close of the evidence the defendant moved for a verdict on the ground that the consummation of the lease whereby the entire plant, assets, and business of the defendant company passed into the hands of the French company for a period extending beyond the limit of plaintiff's employment, did not so far put it out of the defendant's power to perform its contract with the plaintiff as to amount to a revocation of the contract. Whether this motion should have been granted is a question for consideration.

In support of the motion it is urged that the essence of the contract, as far as the plaintiff was concerned, was the salary and compensation which he was to receive under it; that whether work should be exacted of him was a matter wholly with the defendant, not of the essence of the obligation, and if the plaintiff received his salary to the end of the term of his contract he was not to be heard to complain because he was given no work; that the giving of the lease in no way prevented the defendant from paying the plaintiff his salary as it should become due; and that since the letter of October 7, as interpreted by the court, did not constitute an essential breach of the contract, and there was no salary due the plaintiff when he brought this suit, the motion should have been granted. On the other hand, it is argued that the giving of the lease together with the notice to the plaintiff contained in the letter

constituted an entire revocation of the contract and terminated it.

As already observed the defendant by the terms of the contract agreed to and did "employ" the plaintiff for the period of five years. Whether the word "employ" as there used might properly be construed to mean that the defendant would keep the plaintiff supplied with actual work we do not consider; for clearly the intention of the parties was that it should not imply less than that the defendant should keep the plaintiff in its service throughout the term specified. This is of the essence of the contract, and to this extent, at least, the defendant was bound to perform. *Emmens v. Elderton*, 4 H. L. Cas. 624. Did the defendant do this? No question is made but that by its lease the defendant was made powerless to furnish the plaintiff with work, and we think it also thereby severed the relation of master and servant. The defendant informed the plaintiff by the letter of October 7, that the leasing of the business to the French company was an accomplished fact, and that Gentlemen Lumiere had taken on themselves, personally, the responsibility of starting the business from both the commercial and technical point of view. The plaintiff was therein asked to cancel the powers with which he had been entrusted and to leave the field absolutely free to the staff delegated by Messrs. Lumiere. He is also there told that the "Lumiere Societe," which means the French company, would of course, continue to pay him his salary on the sole condition on the part of the plaintiff that he remain at its entire disposition, in case, in the future they should think proper to make use of his experience and ability. But that if he should not be disposed to accept such a position, and if he should desire to be at liberty to employ his energies in another business, the defendant would be quite disposed to discuss with him "any proposals for

rescinding the agreement with the Societe Lumiere et Fils, who have now the entire control of our affairs, which agreement has still three years to run." The fair interpretation of this part of the letter is that all the defendant's rights to the plaintiff's services by contract, had been transferred with the property and business to the French company by the lease. Manifestly the defendant so understood it, since otherwise there would have been no occasion to discuss proposals for rescinding the agreement with the French company then in control of the affairs, as lessee. And that the agreement with the plaintiff is the one to which reference is there made appears by the last clause in the same connection, "which agreement has still three years to run." The record shows no other agreement of which this could have been said. Thus the defendant, as far as it had power so to do, disposed of all right to the plaintiff's services for the balance of his term of employment. But the employer could not get rid of its contract in that way. The contract contains no provision for such a transfer, and none can be implied. The plaintiff was engaged to serve the defendant, but this carried with it no implication that he would serve a lessee. We think the giving of the lease by the defendant which included a transfer of all its rights to the plaintiff's further services, of which the plaintiff was notified by the letter of October 7, ended the relation of master and servant between them, and operated as a dismissal of the plaintiff without cause.

The case of *Brace v. Calder* (C. A.), [1895] 2 Q. B. 253, is very much in point. There the plaintiff had agreed with the defendants, a firm consisting of four members, to serve them as manager of the office part of the business of Scotch whiskey merchants then carried on by them in the city of London and surrounding districts for the term of two years, at a fixed salary. Before the expiration of the term two of the

partners retired, the other two continuing to carry on the business under the same firm name. The plaintiff, having no notice of the change, continued to act as manager for some months thereafter. When he learned of the transfer of the firm's business, the transferees insisted on their right to his services under his contract of employment with the old firm; but he refused to recognize such right in them, and declined to act for them. The plaintiff brought suit before the term of the contract had expired, to recover his whole salary for that portion unperformed. One question before the Court was to the effect of the dissolution of the partnership. It was held that the dissolution operated as a wrongful dismissal of the plaintiff.

In *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U.S. 264, 28 L. ed. 423, a life insurance company had transferred all of its assets to another company, the transferee in consideration thereof agreeing to re-insure all risks of the transferor and to assume all its liabilities. It was held that by transferring all its assets and obligations to the new company the old company totally abandoned the performance of its contract with the complainant, and that the latter had a right to consider his insurance contract as terminated by the act of the company, and to sue to recover back whatever was justly due him by reason of premiums paid. Mr. Justice Bradley speaking for the Court said: "Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby." In *Pierce v. Tennessee Coal, Iron & Railroad Co.*, 173 U. S. 1, 43 L. ed. 591, the railroad company promised to pay one of its employees, who had been injured in the performance of his duties, certain wages a month, and to furnish him with certain

supplies as long as his disabilities continued, in consideration whereof the employee agreed to do such work for the company as he was able to do, and to release it from all liability upon his claim for damages for his injuries. This contract was performed for some months, and then the company abandoned it and discharged the employee from its service. The suit was brought for damages for the company's breach and abandonment of the contract. The evidence tended to show that by the injuries the employee was permanently disabled. The fundamental question in the case was whether the contract in suit was a contract intended to last during the employee's life, or was a mere contract of hiring from month to month, terminable at the pleasure of either party at the end of any month. It was held to be for so long as the employee's disability to do full work continued, which might be for life, and that the employee had a right to treat the contract as absolutely and finally broken, and to maintain the action as for a total breach of the entire contract, and to recover all the damages resulting therefrom.

The case of *Turner v. Sowdon & Co.* (C. A.), [1901] 2 K. B. 653, cited by the defendant, is not in conflict with the doctrine laid down in the cases to which we have made reference. There the contract of employment, in its substantial features, closely resembles the one now before us. The employer agreed to engage and employ the employee as servant and representative salesman for the term of four years, salary to be paid in monthly installments. After the employee had acted in the performance of his contract for some time, he was notified by the employer that although he would still be in the employ of the firm and at their disposal he would not thereafter be required to perform any duties; that he would please call for his salary when the next installment should be due

and he would then be given any further instruction. The employee called at the office of the firm the next day, but was requested to leave. Immediately afterwards circulars were issued by the firm to their customers stating that the employee had no authority to transact any business in their behalf. The employee then commenced business on his own account, and brought his action against the firm for damages for breach of contract, on the ground that the firm after the day of notice to him had neglected and refused to continue to engage and employ him as their servant, etc. Following the case of *Emmens v. Elderton*, to which reference has already been made, the Court held that the word "employ," as used in the contract, meant to retain in service, and not to give actual work to be done by the person employed, hence that judgment should be entered for the defendant. It will be noticed that the defendants there, unlike the defendant in the case before us, continued to own and carry on the business, and at all times had the power to perform their part of the contract.

Nor is the case of *Sands v. Potter*, 165 Ill. 397, 56 Am. St. Rep. 252, cited by the defendant in conflict. There while the servant was engaged in the performance of his contract of service, a corporation was formed by the master and thereafter the business was carried on in the corporate name, but all the stock was taken by the master and the business conducted the same as before. It was held that the incorporation of the company was a mere nominal affair, and that the contract between the master and the servant was not abrogated because of its formation.

The defendant further contends that the court erred in not holding as a matter of law that the correspondence discloses such acquiescence in the proposed lease and assent thereto by the plaintiff during the negotiations as precludes him from

setting up the lease as a breach of the contract, and in not directing a verdict accordingly. But the question of assent did not rest on the correspondence alone. The letters upon which the defendant bases its contention in this regard were written while the plaintiff was engaged in the performance of his duties under his contract covering a period of some fourteen months ending about the time this suit was brought. On August 21, 1902, the plaintiff wrote a letter to the defendant company in effect stating, among other things, that upon information obtained regarding the working of competitors, he had come to the conclusion that it would be absolutely necessary for the company to be in a position to supply films, papers, and chemicals in order to place successfully its plates on the American market. On the 8th of November, following, the manager of the company wrote the plaintiff that "Lumieres had agreed to purchase the English Company, Stock and Barrel," subject to the confirmation of their shareholders. "Lumieres take over all contracts and liabilities. * * * The time limit for settlement is fixed for March 31st next. They are to notify us by Dec. 28th that they will exert or relinquish their option. * * * I hope that this new development will mean a good thing for you, as the present unsatisfactory condition has been an impossible one and must have caused you some anxiety." Thenceforth there was a large amount of correspondence between the plaintiff and the defendant touching the proposed lease of defendant's plant and business to the French company, until the plaintiff received notice by the letter of October 7, that it "is now an accomplished fact." The plaintiff made suggestions from time to time regarding necessary details in effecting that purpose, and at the request of the defendant prepared and forwarded to it inventories of the plant and machinery to be used in connection therewith. The

correspondence does not show, however, that he ever in terms in his own behalf assented to any leasing that would terminate his employment by the defendant. On the contrary in a letter from him to the directors of the company dated April 16, 1903, he stated: "Yesterday I received a communication from your secretary, dated April 1st, 1903, in which, after referring to the completion of the factory and the disputes with the contractors regarding work incomplete, he states: 'with regard to what remains to be done it is obvious that you must look to receive your instructions from Lyons, and not from here, as the leasing of this company, stock, lock, and barrel to Messrs. Lumiere & Sons of Lyons may be now considered an accomplished fact.' He further states that I shall doubtless receive some information by cable in a few days from Messrs. Lumiere & Sons regarding going to Europe to consult with them. Now in order to prevent any misunderstanding as to my position here, which would mean a further delay in the starting up of the business, I must point out to you the fact that my contract is with the Lumiere North American Co., Ltd., and until such time as this contract is properly dissolved or cancelled to the mutual satisfaction of all parties concerned, I cannot possibly recognize instructions emanating from any other source than the directors of the company I am engaged by. I think you must agree that this is my legal position." In the same letter the plaintiff then goes on to say that when the business is formally taken over by Lumiere & Sons, it will be necessary to send him full and detailed instructions regarding the many formalities which must necessarily be performed to invest Lumiere & Sons with the property under the various legal requirements of this State, not forgetting a certified copy of the lease which by the laws here must be registered. The defendant notified the plaintiff by letter dated April 30, 1903, that the lease had

been ratified by the shareholders, but that it would be "some little time before the deed, which will be a somewhat complicated document, can be prepared, and Messrs. Lumiere do not propose to avail themselves of any rights under the lease, until the document is executed." In its letter dated May 19, 1903, to the plaintiff, the defendant referring to plaintiff's letter of April 16, wherein he asks instructions as to his exact position, states that the actual lease had not been sanctioned, but only power given to the directors to bring about such lease. That the lease is not an accomplished fact, and until the lease is signed, nothing will be changed and the plaintiff must deal with the directors of the defendant, adding, "He can and ought to consider what will be his position after the signing of the lease, nothing is more just and on our part we are considering it much and he can rely on it that we shall not forget him." June 10, 1903, the plaintiff wrote defendant, "I was in hopes that my letter addressed to your directors, under date of April 16, would clearly define the position that I should have to take with reference to conducting communications direct with Lyons, pending the receipt of instructions from your board upon the subject. * * * If it is the desire of your directors that I should open negotiations with the French Societe Lumiere, with a view of making such arrangements with them as will permit me to cancel my present contract with your company, I shall be pleased to do so upon receiving from you a certified copy of a resolution passed by your directorate, approving and authorizing me to open such negotiations without in any way prejudicing my present contract with your company." On July 2, one of the directors for the company, wrote the plaintiff enclosing an official letter covering a resolution which had been signed by the directors individually but not passed at a meeting of the board, together with a copy of the

resolution so signed, and stating that the resolution would be confirmed and approved at the first board meeting thereafter held. On receipt of this official letter and copy of resolution the plaintiff replied thereto: "The resolution and official letter attached do not quite cover the ground required. The resolution authorizes me to enter into arrangements with the Societe Lumiere, to act as its representative in the United States, and your official letter states that the resolution formally authorizes me making arrangements 'To continue the services you have hitherto rendered to that company as its representative and duly authorized agent in the United States.' The letter I received from Mr. Ferdinand Coste, and of which I sent you a copy, requested me to let him know whether I would eventually agree to act as their Commercial Manager in this country; the two above mentioned positions are entirely different. I think, however, I have made myself perfectly plain in previous correspondence, and, under these circumstances, and especially having regard to the indecision that seems to exist in completing the details of taking over the business, perhaps it will be well to defer further discussion upon the subject until such time as some definite proposal is made to me." Thus the matter drifted along until the writing of the letter of October 7, by the defendant and its receipt by the plaintiff.

The plaintiff testified that he never expressly consented to the leasing of the property, and that anything he did or any information that he furnished with reference to the leasing, was as the agent of the defendant and because he was requested to do so by it; that the defendant requested him to do certain things and he as agent was obliged to do them; that if they wrote him for an inventory of machinery, he supplied it; that he had nothing to do about defendant's leasing, and had no option to tell defendant whether it should lease the business or

not; that he was never asked to consent to any arrangement between the defendant and the French company, and beyond what information was given him by the letter of October 7, he had no intimation that he had been provided for in the lease until nearly three months after the commencement of this suit.

The record shows other evidence bearing on the question of the plaintiff's assent to the transfer of the property and business to the French company by lease, but enough has been particularly noticed to make it clear that this question did not stand on the correspondence alone. The plaintiff was entitled to have it determined on the whole evidence bearing thereon, and while it is true that generally the construction of written instruments is a question for the court, it is likewise true that where the case turns upon the proper conclusions to be drawn from a series of letters taken in connection with other facts and circumstances it is one which may properly be referred to a jury. *Rankin v. Fidelity Ins. T. & S. D. Co.*, 189 U. S. 242, 47 L. ed. 792; *West v. Smith*, 101 U. S. 263, 25 L. ed. 809.

Defendant excepted to that portion of the charge where the court told the jury that the consummation of the lease for a period which exceeded the limit of the plaintiff's employment, and by the terms of which all the plant, property, and business of the defendant at Burlington passed into the hands of the French Company, was a breach of the contract entitling the plaintiff to maintain this action, unless his conduct prior to the consummation of the lease, or his conduct subsequent precludes him from setting that up as a breach. This part of the charge with the exception of the last clause is in accordance with our holding on the same question raised by the motion for a verdict and needs no further discussion. The modifying clause relating to subsequent conduct was error, but it was an error in defendant's favor and not here available. As we have

already seen the contract in question is one for services merely, and in law the defendant dismissed the plaintiff without cause. This it had the power to do, thereby subjecting itself to the consequences of a violation of its contract, and the plaintiff was not at liberty to disregard the dismissal by continuing his labor and claiming pay for it after he had received notice of his discharge. *Derby v. Johnson*, 21 Vt. 17.

For the same reason, if for no other, Exhibit T, showing cash advanced by the plaintiff after he received notice of his discharge, and purporting to have been settled with the representative of the French company, was properly excluded. Its admissibility is claimed only on the ground that it was evidence showing that the plaintiff was then acting for the defendant. Yet as just seen the plaintiff could not affect the discharge by continuing his service, hence the evidence was immaterial.

The defendant made a large number of requests to charge, covering more than seven pages of the printed record. It excepted "to the failure to charge as requested, in so far as there may have been an omission to charge as requested, and to the charge as given upon these points on those several requests." But these exceptions are qualified and too general to be noticed. *Luce v. Hassam*, 76 Vt. 450.

Judgment affirmed.

HERBERT R. SIAS v. THE CONSOLIDATED LIGHTING CO.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed October 29, 1906.

Master and Servant—Inexperienced Servant—Master's Duty to Caution and Instruct—Contributory Negligence—Question for Jury—Fellow Servant—Vice Principal—Requests to Charge—General Exceptions to Failure to Charge as Requested—Effect.

The duty of the master to caution and instruct an ignorant and inexperienced servant may arise in respect of an adult servant as well as in the case of a child; and where that duty exists and the master delegates its performance to a third person, the latter is, in respect thereof, a vice principal.

In an action by a servant against an electric light company for personal injuries resulting from the fall of one of defendant's poles at the top of which plaintiff was working, his evidence tended to show that he was employed by defendant through its foreman, with whom and under whose direction he always thereafter worked; that he was an ignorant and inexperienced workman, which fact was recognized by the terms of his employment. Defendant's evidence tended to show that plaintiff was an experienced lineman, and that he contracted to do the work of a lineman without reservation. *Held*, that whether said foreman was a vice principal depended upon whether the situation was such as to impose upon defendant the duty of instruction, and that this depended upon what the jury might find as to plaintiff's knowledge and experience, and, therefore, it was error to refuse to instruct the jury upon the doctrine of fellow servant.

Sias v. The Consolidated Lighting Co., 73 Vt. 35, distinguished and explained.

Certain of defendant's written requests asked for the instructions therein recited on the law relating to fellow servants and vice principals. In the course of its charge the court told the reporter to note that these requests were not complied with "be-

cause of the reference to the fellow-servant doctrine, which the court understands to have been treated by the Supreme Court as inapplicable here," and said nothing further upon the subject of fellow servant. Defendant excepted to the refusal of the court to charge in accordance with said requests, and other requests specified, and to "the charge as given in respect to said requests," but took no exception in terms to the failure of the court to charge as to the law relating to fellow servants. *Held* that, in the circumstances, the exception to "the charge as given in respect to said requests," amounted to an exception to the refusal to give any instructions on the law relating to fellow servants.

Evidence considered and *held* that, as it tended to prove that plaintiff was an inexperienced workman, unacquainted with the methods used for the protection of linemen, and that he contracted with reference to his disability in these respects, it was not error to refuse to direct a verdict for defendant on the ground of contributory negligence and assumption of risk.

CASE for negligence. Plea, the general issue. Trial by jury at the September Term, 1903, Washington County, *Hasseltton, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

This case has been once before in the Supreme Court, 73 Vt. 35. Since the first trial, plaintiff filed a new declaration, relying upon his ignorance and inexperience and defendant's duty to warn and instruct. The plaintiff's injuries resulted from the fall of one of the defendant's electric light poles, at the top of which plaintiff was engaged in "stripping," that is, in freeing the pole from its attachments preparatory to lowering it for the purpose of putting in a new pole. The pole in question was so decayed below the surface of the ground that when plaintiff detached the wires and guy at the top it fell, thus causing the injuries complained of. The plaintiff's evidence tended to show that defendant should have tested the pole, and if it was found unsafe, should have supported it

by guys or otherwise, before sending plaintiff up to "strip" it. The defendant claimed that the plaintiff was guilty of contributory negligence in failing to inspect the pole before climbing it, and in releasing a certain span wire, while he was at the top of the pole, and pulling it over while the guy wire was yet attached to the pole. The defendant's eleventh request to charge was as follows:

"II. That upon the evidence in the case Snow was a fellow servant of the plaintiff and was not a vice principal of the defendant, or such superior of the plaintiff in the employment of the defendant as to make the defendant liable for any injury arising from any misconduct or misdirection of Snow in respect of the plaintiff, and so the plaintiff is not entitled to recover because of anything which Snow did, or from any direction he may have given to the plaintiff."

John H. Senter and Fred A. Howland for the defendant.

The plaintiff assumed the risks from which he suffered the injuries complained of. This is not a case where a servant is working on a pole supposed to be sound; but the evidence shows he was to strip a pole which had become useless, probably unsound, and which after being stripped was to be taken down and replaced with a sound pole. *Wood v. New Bedford, etc. Co.*, 121 Mass. 256; *Murch v. Wilson's Sons & Co.*, 168 Mass. 410; *Shearman & Redfield, Negligence*, §87; *Pittsburg, etc. R. Co. v. Adams*, 105 Ind. 151; *Thomp. Negligence*, 857; *Gibson v. Erie R. R. Co.*, 63 N. Y. 454; *Browne on Dom. Rel.*, 131; *Farwell v. Boston, etc. Ry. Co.*, 4 Met. 57; *Ball v. Detroit Leather Co.*, 73 Mich. 158; *Shields v. Yonge*, 60 Am. Dec. 698; *Fisk v. Cent. P. R. R.*, 1 Am. St. Rep. 22; *Warner v. Erie R. R. Co.*, 39 N. Y. 471; *Beaulieu v. Portland Co.*, 48 Me. 295; *Lawler v. Androscoggin R. R. Co.*, 62 Me.

467; *Ziegler v. Day*, 123 Mass. 152; *Wilds v. H. R. Co.*, 24 N. Y. 430; *Minick v. City of Troy*, 83 N. Y. 514; *Claybaugh v. Kansas City &c. R. R. Co.*, 56 Mo. App. 630; *Linton Coal &c. Co. v. Parsons*, (Ind.) 43 N. E. 652; *Whalen v. City Gas Light Co.*, 151 N. Y. 73; *McGorty v. So. N. E. Tel. Co.*, 69 Conn. 635; *Flynn v. The Boston Electric Lighting Co.*, 50 N. E. 938; *McIsaac v. North Hampton &c. Co.*, 51 N. E. 524; *Lord v. Inhabitants of Wakefield*, 185 Mass. 214; *Tanner v. Railroad*, 180 Mass. 573; 1 Bailey's Personal Injuries, §1123; *Richmond &c. Co. v. Bevins*, 103 Ala. 142; *Penn. Co. v. O'Shaughnessy*, 122 Ind. 588; *Erskine v. Chinoyal Beet-Sugar Co.*, 71 Fed. 270; *Hayden v. Bridge Co.*, 151 Pa. St. 620; *Cunningham v. Railroad Co.*, 17 Fed. 882; *Bunt v. Mining Co.*, 138 U. S. 483; *Railroad Co. v. Jones*, 95 U. S. 439; *Kane v. Railway Co.*, 128 U. S. 91; *Goodlett v. Railroad*, 122 U. S. 391; *Kresanowski v. Railroad Co.*, 18 Fed. 229; *Railroad Co. v. Nickels*, 50 Fed. 723; *Chicago &c. Co. v. Davis*, 53 Fed. 63.

The court erred in failing to charge as to the law of fellow servant, and in refusing to charge in accordance with defendant's requests numbered two and eleven. *Gillshannon v. Stony Brook R. R.*, 10 Cush. 231; *Randall v. B. & O. R. R. Co.*, 109 U. S. 483; *Murray v. S. C. R. Co.*, 36 Am. Dec. 271; *Ling v. Railroad Co.*, 50 Minn. 160; *Hough v. Ry. Co.*, 100 U. S. 215; *King v. Boston &c. R. R. Co.*, 9 Cush. 114; *Am. Tel. & Teleg. Co. v. Bower*, (Ind.) 49 N. E. 182; *Pierce v. Oliver*, (Ind.) 47 N. E. 489; *McAndrew v. Burn*, 39 N. J. 119; *Stevens v. Chamberlin*, 51 L. R. A. 525; *Holden v. Fitch. R. R.*, 129 Mass. 271; *N. P. Ry. Co. v. Dixon*, 194 U. S. 338; *Keenan v. N. Y. &c. R. Co.*, 39 N. E. 711; *Lanning v. N. Y. &c. Co.*, 49 N. Y. 522; *Mower Lime Co. v. Richardson*, (Va.) 28 S. E. 334; *Lawler v. Androscoggin R. R. Co.*, 62 Me.

467; *Warner v. Erie R. R. Co.*, 39 N. Y. 469; *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278; *Thompson v. R. R. Co.*, 45 N. E. 655; *Hayes v. Colchester Mills*, 69 Vt. 1; *Geno v. Fall Mt. Paper Co.*, 68 Vt. 568; *Worthington v. C. V. R. R.*, 64 Vt. 107; *Davis v. C. V. R. R.*, 55 Vt. 84; *Hard v. Vt. & C. R. R.*, 32 Vt. 473; *Baltimore & C. R. R. Co. v. Baugh*, 149 U. S. 368.

Gordon & Jackson and R. A. Hoar for the plaintiff.

"When an employer engages one to perform a dangerous service which requires caution and the exercise of peculiar skill, knowing that he is without experience and ignorant of its dangers, it is the duty of the employer to give the employee suitable instructions and warning as to the dangers he is likely to meet in the performance of the service he is engaged in, and is required by the employer to perform." *Reynolds v. B. & M. R. Co.*, 64 Vt. 66; *Louisville & C. Co. v. Miller*, 104 Fed. 124; *Shear. & Red. on Neg.* (5th ed.) §219 a; *Ill. C. Ry. Co. v. Price*, 72 Miss. 862; *Gibson v. Pac. Ry. Co.*, 46 Mo. 163; *Campbell v. Eveleth*, 83 Me. 50; *Felton v. Girardy*, 104 Fed. 127; *Ellis v. N. P. Ry. Co.*, 103 Fed. 265; *Hughes v. C. M. & C. Co.*, 79 Wis. 264; *Brennan v. Gordon*, 118 N. Y. 489; *Wharton on Neg.*, §206; *LaFlam v. Missisquoi Pulp Co.*, 74 Vt. 125; *Kilpatrick v. G. T. R. Co.*, 74 Vt. 288; *Davis v. R. R. Co.*, 55 Vt. 84; *Noyes v. Smith*, 28 Vt. 19; *Martin v. Levagood*, 47 Kan. 36; *Buzzel v. L. Mfg. Co.*, 48 Me. 113; *Houston v. Brush*, 66 Vt. 331; *Byron v. N. Y. & C. Co.*, 26 Barb. 39; *Louisville & C. R. R. Co. v. Miller*, 104 Fed. 124.

An inexperienced man like the plaintiff was not bound, as matter of law, to inspect the pole before climbing it. *Starr v. Krenberger*, 79 Am. St. Rep. 92; *Houston v. Brush*, 66 Vt.

331; *Brown v. C. & C. R. Co.*, 53 Iowa 595; *Gibson v. P. R. R. Co.*, 46 Mo. 163.

The court could not order a verdict on the ground that the plaintiff released the span wire while the guy wire was still attached to the pole. *Severance v. M. E. T. Co.*, 72 Vt. 181.

"If a servant ordered into a place of danger, obeys and is injured, he will not be held to be guilty of contributory negligence, unless the danger is so glaring that a reasonable and prudent person would not have entered into it." 1 Bailey, *Personal Injuries*, §§899, 900, 902, 903; *Shortel v. St. Joseph*, 104 Mo. 114; *Lebanon v. McCoy*, 12 Ind. 500; *Ind. Cor. Co. v. Parker*, 100 Ind. 181; *Harrison v. D. R. G. A. R. Co.*, 7 Utah 523.

MUNSON, J. A former decision of this case is reported in 73 Vt. 35. It appeared upon the trial then under review that plaintiff was employed for the defendant by one Snow, that he had always worked with and under the direction of Snow, and that he was specially directed by Snow to do the act which resulted in his injury; but it did not appear what plaintiff's counsel claimed from this in argument or by way of request. Defendant's counsel argued an exception to the failure of the court to instruct the jury upon the doctrine of fellow-servant, and the court held that the exception could not be sustained because it did not appear that the plaintiff stood upon any ground that entitled the defendant to a charge on that subject. Upon the trial now before us the court treated this as a holding that the fellow-servant doctrine was not in the case, and declined to charge the jury in regard to it. This was a misapprehension of the scope of our decision; and it will be necessary to inquire whether the fellow-servant question

was presented by the evidence on the second trial, and what objections were made and exceptions taken relating to that subject.

Plaintiff testified in substance that he was employed for the defendant by Snow, who had charge of the defendant's plant at Barre; that he had had but little experience in climbing, and that the climbing he had done had not included the work of stripping; that he told Snow that he wanted to work up from the bottom and learn the business; that he was to work with Snow and under his directions, doing whatever he was capable of doing; that he expected he would have to climb sometime, as he went on learning the business; that he always worked with and under the directions of Snow, and was doing so when the accident occurred; that he was not fully aware of the dangers arising from decaying poles, had no knowledge of the methods of staying them to prevent their falling, and had never received any instructions upon these matters. It is evident that in this trial the plaintiff's case was put upon the theory that he was an ignorant and inexperienced workman who needed caution and instruction, and that he was recognized as such by the terms of his employment.

The defendant sought to show by a cross-examination of the plaintiff, and the introduction of other evidence, that the plaintiff was not as ignorant as he professed to be, that during his previous experience as a lineman he had taken his regular turn with his fellow linemen in climbing and stripping poles, and that he contracted to do the work of a lineman without reservation. Snow testified that he acted under the manager, and did not have any general direction of the business; that plaintiff applied to him and wanted to go onto the line to work; that the duties of a lineman include climbing, and that he knew from previous observation that plaintiff had been

working as a climber; that plaintiff did not say that he wanted to learn climbing, and that he did not remember his saying that he was a beginner and wanted to learn the business.

Upon this evidence, plaintiff claimed that he was inexperienced and entitled to instruction, that Snow was the representative of the defendant as regards the duty of instruction, and that Snow's failure to caution and instruct him was the negligence of the defendant; while defendant claimed that plaintiff was an experienced lineman, that there was no duty of instruction, and that Snow was merely a fellow servant of the plaintiff.

The question whether Snow was in this matter the representative of the defendant, or merely a fellow servant of the plaintiff, would depend upon whether the situation was one that imposed on the defendant the duty of instruction, and this would depend upon what might be found as to the plaintiff's knowledge and experience. *Hayes v. Colchester Mills*, 69 Vt. 1. The duty of instruction may arise in the case of an inexperienced adult as well as in the case of a child. *Reynolds v. Boston & Maine R. R. Co.*, 64 Vt. 66. It is clear that the claims regarding the plaintiff's capacity and undertaking entitled the defendant to a charge upon the doctrine of fellow servant. It is not necessary to consider the subject as related to the claimed incompetence of Snow.

The defendant's second request was as follows: "That the plaintiff undertook and contracted with the defendant when he entered its employment, voluntarily to assume all the natural and ordinary risks of that employment, including those arising from the misconduct of his fellow-servants." In taking up the requests during the charge the court said to the reporter, "You may note that the second request is not complied with, as it relates to the fellow-servant doctrine." The eleventh

request dealt with Snow's relations to the defendant and the plaintiff, and the distinction between a vice principal and a fellow servant; and during its charge the court said with reference to this, "The reporter may note that the eleventh request is not complied with because of the reference to the fellow servant doctrine, which the court understands to have been treated by the Supreme Court as inapplicable here." The charge contained nothing further upon the subject. Defendant excepted to the refusal of the court to charge in accordance with the second and eleventh requests, and other requests specified, and to the charge as given in respect to said requests. No exception was taken in terms to the failure of the court to instruct the jury as to the law relating to fellow servants.

The plaintiff claims that it was not error to refuse to comply with the second and eleventh requests as drawn. We do not find it necessary to inquire regarding this. The court did not reject the requests as erroneous in themselves, but because of the subject-matter contained in them. It disposed of every request touching the doctrine of fellow servant by saying in substance, in the course of the charge, that there was nothing in the case that called for instructions upon that subject. In these circumstances, the exception to "the charge as given in respect to said requests" may well be construed as an exception to what was said in the charge upon that subject, which was a refusal to give any instructions regarding it. The court must have so understood the exception. An exception to the refusal to charge on that subject would have been more apt in terms, but cannot be held to have been necessary, in view of the manner in which the subject was taken up and disposed of. This will require a reversal of the case; and will also require that it be remanded for a new trial, unless it be held

that the defendant was entitled to have its motion for a verdict sustained.

The defendant moved for a verdict on grounds which may be summarized as follows: That the plaintiff was guilty of contributory negligence in not doing his work by climbing the opposite pole; in climbing the pole he did without inspecting it or testing it in any manner; and in releasing the span wire from that pole while the guy wire was still attached to it; that the plaintiff's want of prudence in these matters was the proximate cause of the accident; and that the accident resulted from a risk which the plaintiff assumed in entering defendant's employment.

It was held in reviewing the former trial that there was no evidence of negligence on the part of the defendant, and that a verdict should have been directed in its favor. The present motion stands upon the claim that it appears from uncontradicted evidence that the plaintiff was guilty of contributory negligence. It was said in the former case that the lineman's employment involves the necessity of working upon poles in various stages of decay; that he contracts with reference to this necessity, and must be held to assume the risks involved in it; that the inspection of poles to determine whether they are safe to climb is a part of the lineman's duty; and that it is for him to determine, from the result of this inspection, which of the different available methods and appliances should be used in proceeding with his work. But these views cannot be held determinative of the present case, unless the evidence bearing upon the plaintiff's capacity and undertaking stands substantially the same. Upon the evidence as it stood in the former case, the plaintiff was treated as one who had undertaken the full duties of a competent and experienced lineman. It cannot be said but that the testimony above recited was

some evidence tending to show that the plaintiff was an inexperienced workman, unacquainted with the methods used for the protection of those engaged in the work of stripping and lowering poles, and that he contracted with reference to his disability in these respects. With this evidence in the case it could not be said as matter of law that the plaintiff was guilty of contributory negligence in acting upon the directions given him by Snow without making an inspection, or in failing to adopt a safer method.

We do not consider it necessary to take up the exceptions regarding the evidence. Some of them were manifestly based upon views of the case now held untenable, and others relate to questions which can easily be avoided without detriment if thought to be at all doubtful.

Judgment reversed and cause remanded.

MARY L. WATKINS v. GEORGE W. CHILDS.

January Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed November 3, 1906.

Equity—Jurisdiction—Bill to Determine Boundaries.

It is not the business of equity to try titles to real estate.

Where neither irreparable mischief, a multiplicity of suits, nor oppressive litigation is threatened, a dispute between independent proprietors of adjoining lands as to the true division line is not sufficient ground for the interposition of a court of equity either

to ascertain and fix such boundary, or to determine the question of title involved.

APPEAL IN CHANCERY, Grand Isle County. Heard at Chambers, April 22, 1905, on demurrer to the bill. *Rowell*, Chancellor. Demurrer sustained, bill adjudged insufficient and dismissed with costs, and case referred to a master to determine the injunction damages. The orator appealed. The opinion states the case.

H. S. Peck for the orator.

Lee S. Tillotson for the defendant.

Where a bill is framed with the sole purpose of obtaining an injunction, and no other grounds of equitable relief are alleged, upon dissolution of the injunction the bill will be dismissed. *Am. Live Stock etc. Co. v. Chicago Live Stock Co.*, 143 Ill. 210, 18 L. R. A. 190; High, Injunctions, §1706.

POWERS, J. The bill shows that a controversy has arisen between the oratrix and the defendant as to the true location of the line dividing their adjoining lands in Grand Isle. That the defendant has, without right or authority, built a fence on a part of the line as he claims it, and threatens to complete the same along the entire length of the same, thereby cutting off a strip of her land several feet in width. There are allegations regarding a suit at law, but they add nothing to the equities of the bill. The prayer is for an injunction and "for such other and general relief as to the court shall seem meet." A temporary injunction was issued and dissolved, and the case comes before us on the demurrer incorporated into the defendant's answer.

Passing over the question whether this is anything more than an injunction bill which should be dismissed upon the dissolution of the injunction prayed for, we take up the question whether equity has, under the allegations, jurisdiction to determine the controversy referred to.

In answering this question in the negative, it is sufficient to say that the law court affords the oratrix a plain and adequate remedy. The existence of a dispute as to the boundary between independent proprietors of adjoining lands does not afford sufficient ground for the interposition of a court of equity to ascertain and fix such boundary. *Walker v. Leslie*, 90 Ky. 642. Nor will equity interfere to determine the question of title involved. 1 Pom. Eq. §177. "It is not the business of equity to try titles, and put one party out and another in." *Frost v. Walls*, 93 Me. 405.

Neither irreparable mischief, a multiplicity of suits, nor oppressive litigation is threatened, for the dispute can be settled in a single action of trespass.

Decree affirmed and cause remanded.

STATE v. FRANK PIANFETTI.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, POWERS, and MILES, JJ.

Opinion filed November 3, 1906.

*Criminal Law—Illegal Sale of Liquor—Former Conviction—
Burden of Proof—Respondent's Right to Plead Over—*

Former Jeopardy—Conviction on Only One of Several Counts—Effect, in New Trial on Reversal.

Where, in a criminal prosecution, the respondent relies upon a plea of a former conviction for the same offence, the burden is on him not only to prove by the record a former conviction, but to establish the identity of the parties and the offences; and failing that, a verdict is properly ordered against him on that issue.

The general rule that, in a criminal prosecution where the respondent relies upon a plea of a former conviction for the same offence, if the same evidence required to support the crime charged in the one case will warrant a conviction in the other, the identity of the offences is established, does not apply in prosecutions for offences which by their nature are capable of repetition, each specific act being a distinct offence, as the illegal selling of intoxicating liquor. In prosecutions for such crimes, no presumption of identity will arise from the fact that evidence sufficient to convict under one will warrant a conviction under the other.

In any criminal prosecution, if the respondent's plea of a former conviction for the same offence is determined against him, he is entitled to plead over.

The conviction of a respondent on one count of an indictment or information containing several counts, is not an acquittal on the other counts, so as to bar further prosecution thereunder when the case is remanded for a new trial on reversal.

State v. Kittle, 2 Tyl. 471, overruled.

Where, in a prosecution under an information in six counts charging illegal sales of intoxicating liquor on different dates, the respondent was convicted of one offence only, but the verdict neither revealed which offence nor under which count, and the judgment on that verdict was reversed by the Supreme Court and the case remanded for a new trial, the verdict and any implied acquittal incident thereto fell together, and left the information standing as though there had been no trial.

INFORMATION containing six counts charging the illegal sale of intoxicating liquor on different dates, and two counts charging illegal keeping for sale on different dates, all in violation of No. 90, Acts 1902. Pleas, not guilty, and a special

plea of a former conviction of the same offences. Trial by jury on issue joined on said special plea, at the December Term, 1905, Caledonia County, *Watson*, J., presiding. Verdict ordered, *pro forma*, against the respondent on the issue raised by his special plea of a former conviction. The respondent then claimed the right to a trial on his plea of not guilty, which was denied, and the court then, without further hearing, entered judgment in chief against the respondent, all strictly *pro forma*. The respondent excepted. The opinion fully states the case. See 78 Vt. 97.

Taylor & Dutton for the respondent.

The court erred in ordering a verdict against the respondent on the issue raised by his plea of a former conviction. Note to *Roberts v. State*, 58 Am. Dec. 547; 1 Bishop's Criminal Procedure, §816; *Quitow v. State*, 1 Tex. Ct. App. 47; Wharton's Pl. & Pr., 421.

The court erred in rendering judgment in chief against the respondent. (1) Because the respondent was entitled to go to the jury on his plea of not guilty. *Lee v. State*, 26 Ark. 260; 1 Wharton's Crim. Law, §§568, 572; Clark's Criminal Procedure, 406 and cases cited in n. 241; 12 Cyc. 362 and n. 29; 12 Cyc. 371 and n. 11; 9 Am. & Eng. Enc. Pl. & Pr., 641 and n. 2. (2) Because the former verdict was equivalent to a verdict of not guilty as to every count, except one for selling. *State v. Kittle*, 2 Tyler 471; *Campbell v. State*, 9 Yerger 333, 30 Am. Dec. 417; *Bell v. State*, 48 Ala. 684; Beale's Crim. Pl. & Pr. 76; *Kring v. Missouri*, 107 U. S. 234; 1 Wharton's Crim. Law, §553; 12 Cyc. 267 and cases there cited in n. 65; 3 Roscoe's Crim. Ev., 617; Wharton's Crim. Pl. & Pr. 740; *Edgerton v. Com.*, 5 Allen 514.

The former verdict was a bar to a prosecution for any offence committed within three years from the date of the filing of the indictment. *State v. Nutt*, 28 Vt. 598; *State v. Haynes*, 35 Vt. 565; *Com. v. Robinson*, 126 Mass. 259; *State v. Sterrenbery*, 69 Iowa 544.

The identity of the offences is established, if the same evidence required to support a conviction of the one would be sufficient to warrant a conviction of the other. *Dinke v. Com.*, 17 Pa. St. 126; *Dominick v. State*, 40 Ala. 680; *State v. Johnson*, 12 Ala. 840; *Durham v. People*, 4 Scammon (Ill.) 172; *Com. v. Roby*, 12 Pick. 496; *Morley v. Com.*, 108 Mass. 433; 3 Rice, Ev. 613; *Com. v. Davis*, 11 Pick. 432; *Com. v. Cain*, 14 Gray 9; Note to *Roberts v. State*, 58 Am. Dec. 536; Note to *People v. McDaniels*, 92 Am. St. Rep. 89.

Guy W. Hill, State's Attorney, and *Elisha May* for the State.

Upon his plea of a former conviction, the burden was on the respondent. *The King v. Roche*, 1 Leach (4th ed.) 135; 1 Bishop, Cr. Pr., §§436, 578; *Com. v. Merrill*, 8 Allen 545.

The legal effect of the record of the former conviction was a question for the court. *State v. Haynes*, 36 Vt. 667; 1 Bishop, Cr. Pr., §582; *Martha v. State*, 26 Ala. 72.

"Whenever a man pleads a fact which he knows to be false, and decision be against him, the judgment ought to be final; for every man must be presumed to know whether his plea be true or false in matter of fact; but upon demurrer to a plea in abatement, there shall be a *respondeat ouster*; because every man shall not be presumed to know the matter of law, which he leaves to the judgment of the court." 1 Bishop, Cr. Pr., §439; 1 Chitty Cr. Law, 451; *State v. Allen*, 1 Ala. 442;

Com. v. Carr, 114 Mass. 280; *State v. Inness*, 53 Me. 536; *Com. v. Roby*, 12 Pick. 496.

POWERS, J. Pianfetti and another were convicted at the December Term, 1904, of Caledonia County Court under No. 90, Acts of 1902, of one offence of illegal liquor selling. The information on which they were tried contained six counts charging illegal sales on May 20, 21, 22, 23, 24, and June 1, 1904, respectively, and two counts charging illegal keeping for sale on January 1 and June 1, 1904, respectively. Many witnesses testified at the trial to unlawful sales, and there was nothing in the verdict to identify the particular offence of which they were convicted or to indicate the particular count under which the conviction was had. The judgment entered on this verdict was reversed by this Court at its October Term, 1905, and the case was remanded for a new trial. *State v. Barr, et al.*, 78 Vt. 97.

In the meantime, at the June Term, 1905, of Caledonia County Court, Pianfetti was indicted for illegal selling. The indictment contained four counts charging illegal sales on February 1, 10, 15, and April 1, 1905, respectively, and the last count charged illegal sales at divers times. To this indictment Pianfetti pleaded guilty to two offences, and paid the fine imposed by the court. There was nothing in the plea, and there is nothing in the record of that case to identify the offence or the count in the indictment to which the plea referred.

The case against Barr and Pianfetti came on for its second trial at the December Term of said court, and separate trials were granted to the respondents. Pianfetti pleaded not guilty and a special plea of former conviction of the same offences in bar. Issue was joined on the special plea, and a jury

trial ordered and had thereon. The respondent introduced the record of his conviction under his plea of guilty as above set forth, with evidence tending to identify himself as the respondent in such former case, and rested.

Thereupon, upon motion of the state's attorney, the court ordered a verdict against the respondent on the issue raised by the special plea, for want of evidence tending to establish the identity of the offences charged in the two prosecutions. To which the respondent excepted.

The respondent then claimed the right to a trial on his plea of not guilty. This claim was denied, and the respondent excepted. The court then, without further hearing, rendered judgment in chief against the respondent for one offence of illegal selling. To this the respondent excepted. All these rulings of the court were *pro forma*.

I. Under the special plea, the burden was on the respondent, not only to prove by the record a former conviction, but to establish the identity of the parties and the offences. 1 Bish. Cr. Pr. §816. To make the defence therein set up effectual, the offence of which the respondent stands convicted must be the same both in law and in fact with the one on trial. *State v. Jangraw*, 61 Vt. 39. And this the respondent must establish. Indeed, this is not here disputed; but the respondent insists that the record itself makes a *prima facie* case of identity in this respect, and invokes the rule that if the same evidence required to support this prosecution would have warranted a conviction in the other, identity of offences is established. This test is frequently applied and is sanctioned by many authorities. But it is held that in prosecutions of offences which from their nature are capable of repetition, (and, it might be added, in common experience are usually many

times repeated), each separate act being a distinct and substantive offence, this test is not applicable, and that no presumption of identity will arise from the fact that evidence sufficient to convict under one would warrant a conviction under the other. In such cases, the respondent must show affirmatively, by proof outside the record, that the offences are one and the same. Thus in *Rocco v. State*, 37 Miss. 357, the respondent was charged with illegally selling liquor to John Hobart. He pleaded in bar a former conviction on the charge of illegally selling liquor to John Smith and divers other persons. He claimed that inasmuch as he might have been convicted in the former case of selling to John Hobart, he was entitled to the benefit of the presumption that the conviction was for that offence. But the Court held that the charge being of an offence capable of repetition, each of which would constitute an offence, there was no presumption of identity.

In *Emerson v. State*, 43 Ark. 372, the respondent was charged with selling liquor to a certain minor in December, 1883. He pleaded in bar a former conviction under an indictment for selling to the same minor in September, 1883. He put in the record of his conviction with proof of the identity of the minor named, and asked the court to rule that this made out a bar, which the trial court declined to do. In affirming this ruling, it was held that the record did not raise a presumption of identity, and that the test above stated did not apply.

In *State v. Andrews*, 27 Mo. 267,—a prosecution for selling liquor without a license with a plea of former conviction for the same offence—it is said that it was incumbent on the respondent not only to produce the record of the former conviction, but to show by testimony that he had been previously tried for identically the same offence as the one for which he

was then prosecuted; and that it was not sufficient to show that the evidence offered on the last trial would have supported the first indictment.

In *State v. Blahut*, 48 Ark. 34, the respondent was charged with selling liquor to Nick Gray, a minor, on January 15, 1886. He pleaded in bar a conviction under an indictment charging him with selling to the same minor on February 15, 1886. It was held that the conviction was no bar without proof of the identity of the offences charged.

State v. Shafer, 20 Kan. 226, opinion by Judge Brewer, is to the same effect. Two complaints were filed charging the respondent with selling liquor without a license to the same person, at the same place, but on different days,—one August 22, the other August 27. The complaints were in all respects alike except in the statement of the time of the commission of the offence. The respondent pleaded guilty of the first charge and paid a fine. He then pleaded that conviction in bar of the second charge. It was held that the two charges being *prima facie* for different offences, one would not bar the other without proof *aliunde* that the same transaction was complained of in the two actions. *State v. Sinell*, 131 N. Y. 571, holds that since each act of selling without a license constitutes a separate offence, the acquittal of a respondent on a charge of selling on and after a certain date is no bar to an indictment for a sale made prior to the transaction to which the record of acquittal relates. The views of our own Court on this question, it must be admitted, have not been at all times altogether clear.

State v. Ainsworth, 11 Vt. 91, is in full accord with the foregoing cases. It was an information in eleven counts charging the respondent with having sold to eleven different persons named, intoxicating liquors by small measure. Under the plea of not guilty the respondent offered to prove that he

had, at the previous term of court, been convicted of selling by small measure to divers persons named. But it appearing that none of the persons named in that indictment were the same as those specified in the information on trial, the court held that the conviction was no bar, and rejected the evidence. In sustaining this ruling, the Court, after alluding to the fact that each act of selling was a distinct offence, said: "When a man is shown guilty of an offence, he may defend himself by the plea of *autrefois convict*, as was attempted in this case. To sustain this defence, the respondent must show that he has been legally convicted of the *same* offence for which he is now prosecuted. To this end, he must produce the record of conviction, and must then produce substantive testimony to show the jury that it was identically the same offence as the one for which he is now prosecuted. In this case the respondent was shown guilty of a certain act of selling. He showed a conviction of an act of selling, which conviction was after the one now proved, but he offered no testimony tending to show it was the same act. The former indictment was for an act of selling alleged to be to a different person. This tended to show it was a different act. The respondent seemed to insist that if the offence was committed before the former indictment, that was a bar. The court very correctly decided the law to be otherwise, and, most clearly, the respondent did not show that the offence, for which he was convicted, was the same as that now shown against him." It is true that the Court, in this opinion, makes some account of the fact that the persons sold to are named in the charges, and appear to be different in the two. But the rule adopted is the rule of the cases above cited, and we should regard it as full authority for the disposition of the question now under consideration were it not

for the fact that the judges have seemed to be somewhat uncertain as to its proper scope and effect.

In *State v. Smith*, 22 Vt. 74, which was an indictment for selling containing three counts, the State was allowed to give evidence tending to prove sales exceeding in number the counts in the indictment. In Supreme Court it was urged in behalf of the respondent that this action of the trial court was error, because on conviction, the record could not be pleaded in bar. In disposing of this proposition, Judge BENNETT proceeds at some length to show *arguendo* that the conviction should be held to be, *prima facie*, a bar to a prior offence. He even says that there is not in *State v. Ainsworth* anything at variance with this idea.

In *State v. Nutt*, 28 Vt. 598, it is held that a conviction of being a common seller was a bar to a prosecution for individual sales made prior to the filing of the complaint. But Judge BENNETT says in the opinion, "This is not like the case where the conviction relied upon in bar, was for an individual act of sale."

In *State v. Haynes*, 35 Vt. at p. 567, it is said by Judge ALDIS: "By the practice before this statute was passed (No. 3, Acts of 1855) it was held that a conviction on a plea of guilty upon an indictment for selling liquor, was a bar to any subsequent prosecution for any offence committed prior to the finding of the indictment." From the fact that no case is cited, nor is any to be found, wherein this question has been so decided, we infer that the practice referred to was one which had obtained in the trial courts only.

It is to be observed that the point now under consideration was not up for determination in these last three cases, and notwithstanding the *dicta* referred to we regard *State v. Ains-*

worth sound in principle and application and a correct statement of the law.

That a conviction or acquittal only bars such offences as were put in issue on the former trial is abundantly shown by *State v. Brown*, 49 Vt. 437. In that case the respondent offered in evidence a certified copy of the record of his acquittal, and requested the court to charge that the acquittal shown thereby was a bar to a conviction for the same offence as tried and determined in that case, and for all offences committed prior to the day of the exhibition of the complaint in that case. It was held that the acquittal barred all the offences put in issue in the former case, but did not bar such offences as might have been, but were not shown by the record or otherwise to have been put in issue in the former case.

The record being no evidence of the identity of the offence, there was nothing to leave to the jury under the special plea, and there was no error in directing a verdict thereon. However it might be if the question were whether or not the court could legally order a verdict of guilty, no good reason exists why on a preliminary issue like this, not in any wise involving the question of the guilt of the accused, any different rule should obtain than in a civil case similarly situated. One of the essential elements of that defence being entirely unsupported by evidence, it was as if no evidence at all had been offered under the plea, in which case a submission to the jury would have been unnecessary. *Johnson v. State*, 34 Tex. Cr. Rep. 115.

II. It is urged that the conviction of one offence on the first trial was, in legal effect, an acquittal on all the counts in the information save one, and as there is nothing in the record to show which count the conviction was on, or to which the implied acquittal is to apply, there is nothing left on which

the court could proceed to trial at all. The proposition that a conviction on one count only of an information or indictment containing several is in law an acquittal on the others is supported by many authorities. In *State v. Kittle, et al.*, 2 Tyl. 471, the respondents were tried on an indictment containing four counts. The jury rendered a verdict of guilty on the fourth count only, and they appealed. The court thereupon required them to plead to the fourth count only, evidently treating the conviction below as an acquittal on the other three counts,—on the charges contained in which the respondents should not again be put in jeopardy. There are cases, however, which hold the verdict to be entire and allow a retrial upon the whole case if it is set aside. *State v. Stanton*, 23 N. C. 424; *State v. Comrs.*, 3 Hill (S. C.) 239. We held in *State v. Bradley*, 67 Vt. 465, that one accused of murder in the first degree and convicted of murder in the second degree, could, upon reversal, be retried on the original charge. The reasoning of that case is equally applicable to the case in hand, and is conclusively against the soundness of the Kittle case; and, though it is necessary to overrule the Kittle case to do so, we hold that the former verdict and the implied acquittal incident thereto fell together upon reversal, and left the information to stand as though there had been no trial.

III. Was the respondent entitled to a trial on his plea of not guilty?

At common law a respondent was allowed to plead over in cases of felony, only. But this rule, originally adopted *in favorem vitae*, did not extend to misdemeanors. 1 Chit. Crim. Law, *461, and cases.

In this country the holdings are not uniform. In 1 Bish. Cr. Pro. §755, the rule is stated to be that when the issue on the special plea becomes one of law, and it is decided against

the respondent, he is allowed to plead over in misdemeanors as well as felonies. But when the issue becomes one of fact, and is decided against the respondent, in misdemeanors it amounts to a conviction, and the court proceeds to fix the penalty. The reason for this distinction is said to be that the respondent is supposed to know the facts, and if such an issue is found against him, the judgment should be final on account of the falsehood. But since a respondent is not presumed to know the law, the determination of such an issue against him should not prejudice his rights, and judgment should be a *respondeat ouster*. *Barge v. Com.*, 3 Pen. & W. (Pa.) 262.

On the other hand, in Wharton's Cr. Pl. & Pr. (9th ed.) §486, it is said that when the plea of *autrefois acquit* or *convict* is determined against a respondent, in this country, in most cases, he is allowed to plead over, and to have his trial for the offence itself,—no note being made of the distinction above referred to. This proposition is laid down in May's Cr. L. §122 and 12 Cyc. 377, and is frequently said to be supported by the great weight of American authorities. The fact is that each of the rules referred to is supported by cases, and an examination of the authorities cited in support of the rule last stated shows that the text writers have in many instances failed to make note of the fact that the issue made in the case was one of law,—many of them being demurrers to the special plea. *McFarland v. State*, 68 Wis. 400, is a vigorous authority for allowing the respondent to plead over. And in addition to the reasons there given in support of such procedure, it may be suggested that there is no more reason in drawing a conclusive presumption of guilt from the respondent's misstatement of fact in his plea, than from such misstatement in his evidence. We regard this rule as more consistent with the theory of the rights of the accused and we adopt it as the

law of this Court, and hold that the respondent should have been granted a trial on his plea of not guilty.

The pro forma judgment is reversed, verdict set aside, and cause remanded.

W. H. HOWRIGAN v. TOWN OF BAKERSFIELD.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed November 6, 1906.

Highways and Bridges—Insufficiency—Horses Traveling Unattended—Estrays Defined—Contributory Negligence—Question for Jury.

The question of what is prudent and reasonable conduct, in a case depending upon a variety of considerations, facts, and circumstances, is one peculiarly for the consideration of the jury.

When the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts or circumstances are so decisive one way or the other as to leave no room for opposing inferences.

In an action against a town for injuries to plaintiff's unattended blind mare resulting from the alleged insufficiency of a highway bridge which defendant was bound by law to keep in sufficient repair, evidence examined and held that it could not be said, as matter of law, that plaintiff was guilty of contributory negligence.

Towns are bound to keep their highways in a reasonably safe condition with reference to such accidents as may fairly be expected to happen thereon.

Where horses or cattle escape from their owner's enclosure into the public highway, without any fault on his part, they are not "at large" or "estrays" within the legal sense of those terms, and the owner is entitled to have the town protect them as travelers.

Russell v. Cone, 46 Vt. 600, distinguished and explained.

CASE for injury to a horse caused by the alleged insufficiency of a highway bridge. Plea, the general issue. Trial by jury at the March Term, 1905, Franklin County, *Rowell*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. At the close of all the evidence defendant moved for a verdict on the grounds stated in the opinion. Motion denied, to which the defendant excepted. Thereupon the parties agreed upon the amount of the verdict for the plaintiff. The opinion fully states the case.

Brigham & Start for the defendant.

The defendant's motion for a verdict should have been granted. The injury resulted from the combination of conditions outside of the highway and conditions within the limits of the highway; and as the plaintiff is responsible for the former, he cannot recover. *Rowell v. Lowell*, 7 Gray 100; *Richards v. Enfield*, 14 Gray 344; *Mobus v. Waitsfield*, 75 Vt. 122.

The defendant owed the plaintiff no duty in respect of the mare. At the time of her injury, she was an estray, and not a traveler. *Stickney v. Maidstone*, 30 Vt. 738.

The proximate cause of the injury was not the insufficiency of the bridge, but the negligence of the plaintiff. This being so, the plaintiff cannot recover. *Baxter v. Turnpike*, 22 Vt. 114; *Hyde v. Jamaica*, 27 Vt. 443.

F. S. Tupper for the plaintiff.

The mare was not off the premises of the plaintiff, and so was not a trespasser. 44 Vt. 49; V. S. §4789; *Congdon v. R. R. Co.*, 56 Vt. 390; *Cressey v. R. R.*, 47 Am. Rep. 227; *Holden v. Shattuck*, 34 Vt. 336.

The fact that a blind person who was injured on the street was in the habit of going about unattended, and was well acquainted with the particular locality in which the injury occurred, shows absence of negligence on his part. *Smith v. Weldes*, 143 Mass. 556; *Sleeper v. Landown*, 52 N. H. 244.

TYLER, J. The case shows that a wooden bridge about twenty feet long, without guards or railings, was situated in defendant town between the plaintiff's farmhouse and a barway that led into his meadow. On the day of the accident, Sept. 19, 1903, the plaintiff's son, who was his tenant, led two horses across the bridge to the meadow, a blind mare following them. After turning them through the barway, without putting up the bars, he walked back towards the house, which was about twenty rods distant. The mare soon left the meadow by the barway and followed Howrigan along the highway, and when he was five or six rods beyond the bridge, she, in attempting to cross it, walked off the ends of the planks, fell upon the rocks below and was injured. Howrigan heard a noise, turned and saw her going off the bridge. He testified that the bridge was not quite in line with the highway, and the mare not going upon it exactly in the middle, walked straight off.

At the close of the evidence the defendant moved the court to direct a verdict upon the grounds that it was contributory negligence in the plaintiff to leave the bars so that the mare could stray from the enclosure and upon the bridge; that it was contributory negligence in the plaintiff to allow the mare to stray along the highway without being driven or led by some

person, and that she was not a "traveler" upon the bridge, within the meaning of V. S. §3490, when the accident occurred.

1. If Howrigan knew, or in the exercise of due care, should have known in season to prevent it, that the mare was following him upon the bridge without guidance and was likely to step off the side, he was guilty of contributory negligence. The question is whether the court erred in overruling the motion and in submitting the case to the jury. A consideration of the evidence, which is made part of the case, is necessary.

It appeared that the mare was used upon the farm in May and June and again a few days prior to the accident, in running a cream separator, and that when she was not at work she was allowed to run loose about the premises and to go to the brook by herself to drink; that she crossed the bridge often in drawing loads, and that she was in the habit of crossing it alone when not at work. The plaintiff's son, Wm. P. Howrigan, testified that the mare would cross the bridge unattended. The son Clyde testified that she was in the habit of crossing the bridge unguided. In answer to a question by the presiding judge, he said: "We started her and she would go all right," which the jury might have understood to mean that the mare only had to be directed towards the bridge when she would cross without guidance. If she was in the habit of crossing without guidance, that fact bore upon the question of Howrigan's negligence.

It appeared that the mare was not accustomed to work with the horses with which she was turned into the field, that they would fight her and that she would not stay with them; but Howrigan did not know whether they annoyed her on this occasion or not; he did not know that she was following him

until he heard her upon the bridge, which was about eight rods from the barway.

The Court said in *Hill, Admr. v. New Haven*, 37 Vt. 510, that the question of prudent and reasonable conduct, in a case depending upon a variety of considerations, facts and circumstances, is one peculiarly for the consideration of the jury. *Rogers v. Swanton*, 54 Vt. 585. Negligence is never presumed of any person, but must be proved.

Whether in the circumstances it was Howrigan's duty, in the exercise of the care of a prudent man, to have looked around and ascertained whether the other horses were annoying the blind mare and whether she was following him, was a question upon which fair-minded men might differ. The fact that Howrigan turned the mare into the meadow certainly tended to show that he wished and expected her to remain there until he should take her out. It was for the jury to decide whether he ought to have foreseen that she would follow him and run off the bridge. The habit of the animal in respect to finding her way alone, whether she was in the habit of following men, whether Howrigan should have anticipated that if she left the field she would go towards home, remain by the roadside or go in another direction, were matters for the consideration of the jury as bearing upon the question of contributory negligence. The court could not have held as a matter of law that he should have anticipated that the mare would immediately leave the meadow and follow him.

The following is the rule in this State: When the standard of negligence is not prescribed and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive one way or the other as to leave no reasonable doubt about it,—no room for opposing inferences.

Worthington v. C. V. Ry. Co., 64 Vt. 107; *Magoon v. Railroad Co.*, 67 Vt. 177; *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 268. We think it cannot be said that the facts and circumstances were so decisive of Howrigan's negligence as to bring the case within this rule.

2. The question whether the mare was a traveler or an estray upon the highway depended upon whether or not Howrigan was guilty of contributory negligence. If he was not, then the mare, having the instinct to return home, had a right to the highway as a traveler; but, if she was upon the highway through her keeper's negligence, she was not a traveler within the meaning of the statute, but an estray.

Baldwin v. Greenwood Turnpike Co., 40 Conn. 238, is in point. There the plaintiff's horse, while being driven on a highway with due care, became frightened without the plaintiff's fault and ran off the highway across private property onto the defendant's turnpike, where he was injured by falling off a defective bridge which the defendant was bound to repair; held, that the defendant was liable. The court said that the defendant's negligence in not keeping the railings of the bridge in proper repair, combined with an accident for which the party was not responsible, was the cause of the injury. This Court said in *Kelsey v. Glover*, 15 Vt. 708, that towns were bound to keep their highways in a reasonably safe condition with reference to such accidents as might be expected to happen thereon.

The reasoning of the Court in *Russell v. Cone*, 46 Vt. 600, is not an authority for the defendant. That case arose under Gen. Sts., ch. 100, §29, which provided that any person who should suffer cattle, horses and other animals to run at large in the highway should be subject to a fine. The defendant on several occasions rode his horse along a highway, and

when near his place of business, fastened the reins to the surcingle so the horse could not graze, and started him towards home, where the defendant's son was on the watch for and took care of him on his arrival, and on all occasions the horse went directly home; held, that this was not a "running at large," because the horse, from his training, could be trusted not to wander upon the highway, but to return to his owner's premises. The inference is, that if the horse had been turned homeward without the restraint of the reins, so it could wander and graze, it would have been considered as being at large, for then the owner would have voluntarily made the horse an estray, while in the case at bar the question was whether it was the act of a prudent man for the keeper to leave the mare in the meadow as he did. The question of contributory negligence was the decisive question and was for the jury.

It is generally held, under statutes prohibiting horses and cattle going at large, that when they escape from their owner's enclosure without his fault or negligence, they are not at large in the legal sense of the term. *Coles v. Burns*, 21 Hun. 246; *Com. v. Fourteen Hogs*, 10 S. & R. 393; *Goener v. Woll*, 26 Minn. 154; *Kinder v. Gillespie*, 63 Ill. 88; *Montgomery v. Breed*, 34 Wis. 649; *Rutter v. Henry*, 46 Ohio St. 272. See 12 Am. & Eng. Ency. 378 and notes; 18 *Id.* 536 and notes, where these and many other cases are cited and considered.

The word traveling has no very precise or technical meaning when it is used without any limitation. Its primary meaning is passing from place to place. 28 Am. & Eng. Ency. 455. If horses or cattle are forced or frightened from an enclosure over a lawful fence into a highway, the owner or keeper being without fault, they cannot be said to be at large or estray, but their owners are entitled to have them protected as travelers.

The reasoning in the opinion in *Holden v. Shattuck*, 34 Vt. 336, is in line with the cases above cited. There the plaintiff was driving along a highway with a horse and carriage when the defendant's horse that was feeding unrestrained upon the roadside suddenly turned and reared at the plaintiff's horse and frightened it so that it ran and was injured. It was held that the mere fact that the horse was upon the highway, unattended by its owner or keeper, could not be regarded as unlawful or a breach of duty rendering the owner liable for injurious consequences; that the defendant being the owner of the land on each side of the road, it should appear that the circumstances and occasion, or the character and habits of the horse, were known to the owner to such an extent as to warrant a finding of the fact of carelessness on his part; that the trial court erred in assuming that the defendant had no right to have or permit his horse to be loose on the highway. This case is authority here only in holding that the mere fact that a horse is loose upon a highway does not prove that its owner is liable for resulting injuries. The owner's negligence must be proved, not assumed. It did not appear that this mare had ever followed Howrigan from this meadow nor that she had ever been placed there before, and his conduct on this occasion tended to show that he did not expect she would follow him, otherwise he would have watched her as she approached the bridge. His conduct in the matter may have been very negligent, but the court could not assume that fact.

These are the only questions raised by the exceptions. There was no error in the court's refusal to direct a verdict.

Judgment affirmed.

WATSON, J., dissents upon the second point.

STATE v. FRED BAIRD.

May Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed November 19, 1906.

*Criminal Law—Larceny—Evidence—Felonious Intent—Cur-
tailing Cross-Examination—Discretion of Court.*

The court may, in its discretion, properly refuse to allow a cross-examiner to go into details in showing the hostility of a witness. In a prosecution for stealing a partnership's money from a safe in its store, where the only defence was that the money was taken by the direction of one of the partners, and there was evidence that the respondent entered the store after it was closed for the night, opened the safe, appeared to take something therefrom and put it into his pocket, and then closed the safe and went out; that counts of the money made before and after this, showed that \$2.50 had been taken; and that when the respondent was arrested he said that he had not been to the safe and did not know its combination; the evidence tended to show that the taking was felonious, and the court properly refused to direct a verdict of acquittal on the ground that the State had failed to show that the money was not taken by the direction of said partner.

In a prosecution for stealing a partnership's money from a safe in its store, where the only defence was that the money was taken by the direction of one of the partners, the court properly refused to allow the respondent to show by that partner that for some time before the occurrence there had been trouble between the partners; that there was a conspiracy between the witness's partner and the latter's prospective son-in-law to make a scapegoat of the respondent for the purpose of getting the prospective son-in-law into the witness's place in the business, to which end a certain bill in chancery to dissolve the partnership was also brought, and that said conspirators had since become partners in business at said store.

In a prosecution for stealing a partnership's money from a safe in its store, where the only defence was that the money was taken by the direction of one of the partners, although the State, in its opening, showed by the other partner that there was no charge to any one of the amount taken, and that no settlement of it had been made with the firm, a witness for the respondent having subsequently testified that the money taken was accounted for by being included in a certain twenty dollar charge, the State, in rebuttal, was properly allowed to show by the bookkeeper that the money taken could not have been included in that charge.

INDICTMENT for petty larceny. Plea, not guilty. Trial by jury at the March Term, 1905, Washington County, *Rowell*, J., presiding. Verdict guilty; judgment and sentence thereon. The respondent excepted. The ruling reviewed in the opinion, as to the admissibility of the evidence in rebuttal, was made as matter of law, and not of discretion. The opinion fully states the case.

M. M. Gordan and *Senter & Senter* for the respondent.

No felonious intent at the time of the taking was shown, hence the court should have directed a verdict of acquittal. *Bullers v. State*, 30 Tex. 367; *Hill v. State*, 57 Wis. 377; *The Queen v. Cole*, 2 Cox C. C. 340; *Love v. People*, 160 Ill. 508; 1 Wharton's Cr. Law, §883; Hughes' Cr. Law and Pr., §2428.

The respondent's several offers to show interest on the part of the complaining witness, Averill, should have been received. 2 Wigmore, Ev., §901; *Burger v. State*, 83 Ala. 36; *People v. Bird*, 124 Cal. 32; *Crippen v. People*, 8 Mich. 117; *Tolbert v. Burk*, 89 Mich. 132; *Ellsworth v. Potter*, 41 Vt. 685; *Hutchinson v. Wheeler*, 35 Vt. 330; Abbott's Trial Brief, 285; Hughes' Cr. Law and Pr., §3036; Abbott's Trial Brief, §§185, 285 and cases cited; 2 Wig. Ev., §§940, 950.

The court erred in holding, as matter of law, that the evidence of the bookkeeper was admissible in rebuttal. *Allen v. Whittemore*, 171 Mass. 259; 3 Wig. Ev., §1873; *Clinton v. McKenzie*, 5 Strobb. 36, 42; *Mueller v. Rebham*, 94 Ill. 142, 150.

Benjamin Gates, State's Attorney, for the State.

MUNSON, J. The respondent, a workman in the employ of Prindle & Averill and a brother-in-law of Prindle, was charged with stealing money from the partnership safe. The defence was that the money was taken by Prindle's direction.

During Averill's cross-examination he testified that he had never had any considerable trouble with his partner, and upon objection being made to a further inquiry, respondent's counsel offered to show declarations and sworn statements made by the witness relative to the respondent and Prindle, and that witness had caused the arrest of the respondent and been active in the prosecution, and that one object he had in view was to drive Prindle out and get control of the business. The court said that any feeling the witness had against the respondent might be shown in a general way, but that counsel would not be permitted to go very much into detail. Counsel took an exception to this ruling, and made no further inquiry. The court's disposition of the matter was correct. It permitted further inquiry as to the feelings of the witness towards the respondent, but with an intimation that not much detail would be allowed. It was within the discretion of the court to limit the inquiry. 2 Wigm. Ev., §951; *Bertoli v. Smith*, 69 Vt. 425. We do not know where the court would have drawn the line, for the inquiry was not pursued.

At the close of the State's evidence the respondent moved the court to direct his acquittal, on the ground that the State

had failed to show that the money was not taken by the direction of Prindle. The State meets this point without claiming that the motion was waived by proceeding with the defence, and we dispose of the matter as argued. The motion was properly overruled. There was evidence that after the store was closed for the night the respondent went into it and opened the safe, appeared to take something out of the safe and put it into his pocket, and closed the safe and went out; that counts of the money made just before and just after this occurrence showed that two and one-half dollars had been taken; and that when the respondent was arrested he said that he had not been to the safe and did not know the combination. This was evidence tending to show that the taking was felonious.

The respondent offered to show by Prindle, who was called for the defence, that for some time before this occurrence there had been trouble between the partners; that Averill was desirous of getting witness out of the business to make a place for his prospective son-in-law; that a conspiracy was entered into by these people to make a scapegoat of the respondent for the purpose of bringing about this result; that a bill in chancery setting up this matter was brought to secure a dissolution of the partnership; and that Averill and the person referred to have since become partners, and are now doing business at the Prindle & Averill stand. Evidence of this character was clearly inadmissible. The respondent had already testified that he went to the safe at the time and in the manner testified to by the State's witnesses, and took the amount claimed to be missing, but that Prindle sent him to get it. The only point in controversy was whether the respondent had this authority. This was something upon which the State's witnesses had said nothing and could say nothing. The offered

testimony had no bearing, direct or indirect, upon the controverted point.

The State showed by Averill in its opening that there was no entry of the amount taken as charged to any one, and that no settlement of it had been made with the firm. The witness was cross-examined as to the manner of keeping the cash account and the contents of the change bag, and was briefly inquired of upon that subject in re-examination. Prindle, a witness for the respondent, testified that the money was accounted for by being included in a twenty dollar item charged to him. In its rebuttal the State was permitted to show by the bookkeeper that the money taken could not have been included in that item. The respondent excepted to this on the ground that it was part of the State's case, had in fact been inquired about in its opening, and was not proper rebutting evidence. The objection was not well taken. It was clearly permissible for the State to meet with further and more particular evidence the specific claim developed by the defence. *Stillwell v. Farewell*, 64 Vt. 286.

Judgment that there is no error in the proceedings and that the respondent take nothing by his exceptions. Let sentence be executed.

SAMUEL BERGMAN v. PETER GAY.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASKELTON, and
POWERS, JJ.

Opinion filed November 19, 1906.

Replevin—Rights of a Lienor Under Common Law Mechanic's Lien—Effect of V. S. 2279-2281, and 2299.

A statute which creates a new mode for the enforcement of an existing right does not abolish a pre-existing mode, without express words or necessary implication to that effect.

A lien arises at common law in favor of one who improves by his labor or expense the chattel of another at the owner's request, and V. S. 2279, which purports to give such a lien, is merely declaratory of the common law.

The enactment in 1888 of V. S. 2279, 2280, and 2281, giving a common law mechanic's lien and providing for its enforcement by a sale of the property by the lienor at public auction, did not take away the benefit conferred by V. S. 2299, enacted in 1867, providing that one holding personal property by a lien implied by law may have it attached and sold on execution in payment of the lien, and that such attachment shall not be a waiver of the lien.

In replevin for a cart, which plaintiff owned subject to an overdue mortgage, and which defendant repaired for plaintiff and retained in his possession to enforce a lien for his services, it appeared that while the cart was thus in his possession, defendant sued plaintiff on his claim and had the cart attached by copy filed in the town clerk's office; that thereafter the cart was taken from defendant's possession on the writ in this suit; that while these two suits were pending in court, the mortgagee took the cart from plaintiff's possession and had it sold on his mortgage; that later defendant obtained judgment in his said suit, and took out execution thereon, which was returned unsatisfied. *Held*, that defendant was entitled to the possession of the cart, as against plaintiff, at the time it was taken on said replevin writ, and that the subsequent taking and sale of the property by the mortgagee cannot

avail plaintiff to defeat defendant's right to a judgment for a return of the property.

REPLEVIN for a cart. Plea, the general issue. Trial by court at the March Term, 1906, Chittenden County, *Miles, J.*, presiding. Judgment for the defendant for the return of the property, one cent damages, and his costs. The plaintiff excepted. The opinion states the case.

C. C. Briggs and H. S. Peck for the plaintiff.

A. V. Spaulding and Cowles & Moulton for the defendant.

The defendant has a right to the possession of the cart as against the plaintiff (1) by statute, V. S. 2279. (2) by virtue of a "lien implied by law." *Benedict v. Murray*, 3 Vt. 302; *Ruggles v. Walker*, 34 Vt. 468. (3) Plaintiff could create a repairer's lien on the property, good as against his own rights, although he had previously mortgaged the property. *Ingalls v. Green*, 62 Vt. 436; *Green v. McDonald*, 70 Vt. 372. (4) The lien was not waived by the attachment. V. S. 2299. (5) The judgment in favor of defendant in the attachment suit is conclusive as to plaintiff's indebtedness to defendant for the repairs. *Sowles, Admr. v. Sartwell*, 76 Vt. 70.

In replevin the question is to be determined according to the respective rights of the parties to the suit. That a third party has a right superior to defendant, or to both plaintiff and defendant, will not advantage plaintiff. He must stand on his own rights, and cannot make use of defects in defendant's title. *Sprague and Carr, Admr. v. Clark*, 41 Vt. 6; *Keniston v. Stevens*, 66 Vt. 351; *Smith Machine Co. v. Holden*,* 73 Vt. 396; *Shinn, Replevin*, §447; 24 Am. & Eng. Enc (2nd ed.) 483.

MUNSON, J. The suit is replevin for a lunch-cart, which plaintiff owned subject to an overdue mortgage, and which defendant repaired for plaintiff and retained in his possession to enforce a lien for his services. Defendant finally sued plaintiff on his claim, and had the cart attached by copy filed in the clerk's office; and on the same day, before the hour when the copy was filed, plaintiff took the cart from defendant's possession by virtue of this replevin writ. While both suits were pending in county court, the mortgagee took the cart from plaintiff's possession and had it sold on his mortgage. Defendant afterwards obtained judgment in his suit, and took out an execution, which was returned unsatisfied. At a subsequent term defendant had judgment in this suit for a return of the property and for one cent damages and his cost.

V. S. 2279 provides that one who makes, alters or repairs an article of personal property at the request of the owner shall have a lien thereon for his charges, and may retain possession of the property until his charges are paid. §§2280-2281 provide for a sale of the property by the creditor in satisfaction of his charges, if the value of the property affected does not exceed one hundred dollars. These provisions were first enacted in 1888. V. S. 2299, first enacted in 1867, provides that one holding personal property by a lien implied by law may have it attached and sold on execution in payment of the debt, and that such attachment shall not be a waiver of the lien. Plaintiff claims that a mechanic's lien on personal property is a right expressly given by statute and not one implied by law, and that defendant has lost his lien by attaching the cart.

A lien arises at common law in favor of one who improves by his labor or expense the chattel of another at the owner's request. Note 16 Eng. Rul. Cases, 94. This right was fully

recognized by our decisions before it was established by the statute. *Burdick v. Murray*, 3 Vt. 302; *Ruggles v. Walker*, 34 Vt. 468. V. S. 2279 is merely declaratory of the common law; and the enactment of this, and the accompanying sections prescribing a remedy, did not take away the benefit conferred by the earlier statute upon holders of this security as a lien implied by law. A statute instituting a new remedy for an existing right does not take away a pre-existing remedy without express words or necessary implication. 26 Ency. Law, 2 ed. 671. So the defendant could bring suit without waiving his lien, and has lost nothing by failing to proceed in accordance with §§2280-2281.

The defendant is entitled to a judgment for the return of the property notwithstanding the facts concerning the mortgage. The plaintiff could charge the property with a lien for its repair subject to the mortgagor's right. *Ingalls v. Green*, 62 Vt. 436. The defendant was entitled to the possession of the property as against the plaintiff at the time it was taken from him under the replevin writ. The subsequent taking and sale of the property by virtue of a prior right derived from the plaintiff cannot be urged by the plaintiff to defeat the defendant's claim of a judgment for the return of the property. The rights of these parties are to be determined without regard to the superior right of another. *Sprague v. Clark*, 41 Vt. 6.

Judgment affirmed.

IN RE ORDER OF RAILROAD COMMISSIONERS, RUTLAND RAILROAD COMPANY, APPELLANT.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and MILES, JJ.

Opinion filed November 20, 1906.

Construction of Statutes—Repeal by Implication—Railroad Commissioners—Supreme Court—Jurisdiction—Depots and Station Houses—V. S. 3890, 3989.

Repeals by implication are not favored, and a statute will not be construed as repealing a prior Act on the same subject, in the absence of express words to that effect, unless the two Acts are so positively repugnant that they cannot be reconciled by any fair and reasonable construction.

A statute will not be construed as ousting or restricting the jurisdiction of a superior court and vesting it in an inferior tribunal, without express words or necessary implication to that effect.

No. 23, Acts 1886, which created the Railroad Commission and defined its powers, having repealed only such Acts and parts of Acts as were inconsistent therewith, neither that Act nor V. S. 3989, which was §10 thereof, as amended by §6, No. 68 Acts 1902, either expressly or by implication repealed V. S. 3890, giving the Supreme Court jurisdiction to compel railroad corporations to establish and maintain suitable depots or station houses at such points on their roads as the court shall designate.

V. S. 3989, as amended by §6, No. 68, Acts 1902, gives the Railroad Commissioners only the power to compel railroad corporations to make changes in respect of *existing* depots and station houses; and the Railroad Commissioners have no jurisdiction to compel the construction of depots or station houses at points where there are no such buildings; that power being in the exclusive jurisdiction of the Supreme Court, by virtue of V. S. 3890.

APPEAL to the Supreme Court for Rutland County, by the Rutland Railroad Company, from an order of the Railroad Commissioners. Heard at the October Term, 1906. The opinion fully states the case.

H. Henry Powers for the appellant.

Clarke C. Fitts, Attorney General, for the State.

MILES, J. This is an appeal from an order of the Railroad Commissioners. No question is made but that the appeal was regularly taken and the cause properly brought to this Court. The only question raised and argued before us rests upon a motion to quash the order of the Board of Railroad Commissioners for want of jurisdiction in that Board to make the order. The facts in the case necessary to be stated for a full understanding of the question raised, are as follows:

For many years previous to the second day of June, 1902, the Rutland Railroad Company had maintained a station at Bartonville, Vt., suitable for the accommodation of passengers and those using it for freighting purposes at that point. On that day, having complied with all the requirements of the statute, the Rutland Railroad Company, appellant in this proceeding, discontinued and removed that station, and from thence until the present time, no station has existed at that place. At some time in 1903, the station house was destroyed by fire, and since then an old dismantled box car has been the only accommodation afforded the patrons of the Railroad Company, who have desired to use a station at that point, and the Railroad Company have kept no station agent there since the discontinuance and removal of the station. The company have stopped their trains there since the discontinuance, to take on persons desiring to board any of its local trains when flagged

for that purpose, and have taken on and delivered small amounts of freight at different times at that point; but, since the discontinuance, the station there has never been re-established. The order from which the Railroad Company took its appeal, and which they move to have quashed, is as follows, viz.:

"It is, therefore, ordered that the Rutland Railroad Company build and erect a depot upon its line at Bartonsville suitable and adequate for the use and convenience of the patrons of the road at that point and complete the same ready for occupancy on or before the 15th day of June, 1906, and that when the same is completed, said Rutland Railroad Company shall employ an agent at said Bartonsville to transact the business of the company at that point. Done at Montpelier, Vt., this 8th day of March, 1906." The order was duly signed by the Board.

Counsel in support of the order claim that, under section 3989 of the Vermont Statutes as amended by section 6 of Act No. 68 of the Acts of 1902, the Board had authority to establish a station on any railroad in this State when they adjudged the public good required it. On the other hand, counsel for the appellant contend that the Board did not have such authority, and that the same is exclusively given to this Court by section 3890 of the Vermont Statutes. This statute was enacted in 1869 and was amended in 1884, when it took its present form. Section 3989 was originally enacted in 1886, and the act containing that section contained another section repealing all acts and parts of acts inconsistent with that act.

That section 3890 gives this Court power and jurisdiction to establish such station upon proper petition and hearing, is undisputed, unless it has been repealed by the repealing clause contained in the act of 1886 or by the amendment of 1902.

To have been repealed by the act of 1886, section 3890 must have been inconsistent with it at the time of its passage. Upon an examination of that section and the act of 1886 it will be observed that section 3890 simply provides for the enforced permanent establishment of a "depot or station house"; while the act of 1886 only provided for the enforced additions to or change in the stations or station houses. No. 23 of the Acts of 1886, section 10.

From this examination it will be observed that section 3890 is not inconsistent with Act No. 23 of the Acts of 1886, and therefore was not repealed by it.

Section 3989 V. S., which is section 10 of No. 23 of the Acts of 1886, was only changed in the amendment of 1902 by adding thereto the following: "or any change of the location of the stations or station houses, or additional or new stations or station houses," thereby providing in the amended section for the enforced addition to or change in the stations or station houses, the change of their location and the erection of additional and new station houses. This amendment contained no express repealing clause, and if it repealed section 3890, it did so by implication. The rule is well established that repeals by implication are not favored, and a statute will not be construed as repealing prior acts on the same subject, in the absence of express words to that effect, unless there is an irreconcilable repugnancy between them, or unless the law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject. It is only when the two acts are positively repugnant to such an extent that they cannot be reconciled and made to stand together by a fair and reasonable construction that the rule "*Leges posteriores priores contrarias*

abrogant" applies. Black on Interpretation of Laws, p. 112 *et seq.*

This rule applied to the case at bar, removes all possible question as to the repeal of section 3890, for there is no repugnancy between this section and section 3989 as amended, and nothing appears in the act nor in the amendment showing an intention on the part of the Legislature to have that amended section supersede section 3890. To hold with the contention of counsel appearing for the Board, would overturn the well established rule of law, that a statute will not be construed as ousting or restricting the jurisdiction of a superior court and vesting the same in an inferior court, without express words or a necessary implication to that effect. Black on Interpretation of Laws, p. 123 *et seq.*

It is urged that, although section 3890 may be the existing law of this State, yet it does not follow that the Board have not the same jurisdiction given to them by section 3989 as amended, and that the two sections, although giving jurisdiction to the Board and the Supreme Court of the same subject-matter, may well stand together. It is needless to consider whether concurrent jurisdiction could exist in this Board of Railroad Commissioners with its limited powers and orders enforceable only by fine imposed by some court having common law jurisdiction, or by application to this Court; for the subject-matter of section 3989 as amended, is different and distinct from that of section 3890, and hence the Board has no jurisdiction over the proceedings provided for in that section.

Section 3890, as before stated, had its origin in 1869 and took its present form in 1884. Its only scope is to invest the Supreme Court with power to compel railroads to establish and maintain suitable depots and station houses *at such points* on their roads as the Court should designate. When this has

been done all the powers of the Supreme Court under this section have been exhausted. This was the status of the law when section 3989 was first enacted. That section was evidently passed to add to the law a power enabling the Board of Railroad Commissioners to inaugurate proceedings to compel the railroads to change their stations and station houses at the point where they already existed and make additions thereto, as the public necessities required, a power in addition to the powers conferred by section 3890. The amendment of 1902 conferred still further powers over railroads and lodged the primary enforcement in the Board of Railroad Commissioners. These added powers enabled the Board, in addition to their right to order the railroads to change their stations or station houses and make additions thereto, to order a change in the location of their stations or station houses and to furnish new and additional station buildings or station houses where a station had already been established and then existed. In looking at the two sections it is plain to be seen that the object of section 3890 is to establish, that is, to create something that did not before exist; and that the object of section 3989 and its amendment was to afford, that is, to furnish, improve and repair something that already existed. We think the Legislature used the words, "stations or station houses" in section 3989 as amended to denote the buildings at the point where a station had already been established and not the place itself, and that it added to the law, instead of declaring the law which it had previously enacted.

The printed case, as is already stated, shows that trains stopped at Bartonville occasionally to take on passengers and freight and to let passengers off and to deliver freight there; but this was done presumably as an accommodation and did not create or establish a station at that point. The result,

therefore, is that the Board of Railroad Commissioners had no authority to make the order which they did make and from which the appeal was taken.

Judgment that the order of the Commissioners is null and void and set aside and held for naught.

STATE v. WILLIAM BURNS.

May Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, POWERS, and MILES, JJ.

Opinion filed November 20, 1906.

Game Laws—Hunting Deer—Open Season—Motion for Verdict—Motion in Arrest of Judgment.

Since No. 94, Acts 1896, prohibits the killing of wild deer at any time except in the open season, and No. 127, Acts 1904, limits the annual open season to the last week in October containing six working days, Sunday excepted, there is no merit in the respondent's claim that on December 7, 1905, there was no statute in this State making it illegal to then kill a wild deer.

Where a transcript of the evidence is not furnished, the Supreme Court cannot determine whether there was error in overruling the respondent's motion to direct a verdict of acquittal, on the ground that there was no evidence in the case tending to prove the crime charged; but nothing further appearing than that the respondent was convicted on instructions not excepted to, the presumption is that there was such evidence.

Judgment is never arrested except for matters apparent on the face of the strict record; hence, a motion in arrest of judgment, on the ground that there was no evidence tending to prove the crime charged, was properly overruled.

INDICTMENT for killing a wild deer during the closed season. Plea, not guilty. Trial by jury at the December Term, 1905, Lamoille County, *Munson, J.*, presiding. The respondent excepted.

Brigham & Start for the respondent.

F. G. Bicknell, State's Attorney, for the State.

MILES, J. This is a prosecution by information against the respondent, charging him with hunting and killing a wild deer in this State, on the 7th day of December, 1905, contrary to law.

The case was tried by jury at the December Term, 1905, of Lamoille County Court. At the close of all the evidence, counsel for the respondent moved the court to direct a verdict for the respondent, for the reason that there was no evidence in the case tending to prove that a wild deer was killed by the respondent as alleged in the information; and that, if there was evidence in the case tending to show that fact, a verdict should have been directed for the respondent, because there was no statute of this State in force at that time prohibiting the killing of a wild deer. After verdict of guilty the respondent moved in arrest of judgment for the reasons set forth in his motion for a verdict.

The case was argued before us without a transcript of the evidence, and none has been furnished us since. Therefore we are unable to say, whether there was or was not any evidence tending to prove that a wild deer was killed as alleged in the information; but, in view of the fact that the jury have found the respondent guilty under the charge of the court,

which was not excepted to, nothing further appearing, the presumption arises that there was such evidence.

The remaining ground upon which the respondent bases his claim that a verdict should have been directed, is, that there was no statute of this State at the time of the alleged killing of the deer, prohibiting the killing of a wild deer. It seems to us that this question is not debatable. Sec. 1, No. 94 of the Acts of 1896, clearly makes it illegal to kill a wild deer at any time, except in the open season. No. 127 of the Acts of 1904 makes the last week of October in each year, containing six working days, an open season, Sunday excepted. December 7, 1905, the date when the deer was alleged in the information to have been killed, was not in the open season. Therefore the respondent's exception upon this point is not well taken, and there was no error in the court's refusal to direct a verdict for the respondent. This view of the law is in harmony with the holding of this Court in *State v. Niles*, 78 Vt. 266.

The respondent's motion in arrest, based upon the claim that there was no evidence tending to prove the charge alleged in the information, was properly overruled; for a judgment is never arrested, except for matters appearing of record. *Trow v. Thomas*, 70 Vt. 580; *Wait v. Starkie*, 68 Vt. 181; *Noyes v. Parker*, 64 Vt. 379; hence, if there had been no evidence tending to prove that the respondent hunted and killed a wild deer, as charged in the information, it was not error to deny his motion in arrest upon this ground.

The respondent's motion in arrest upon the ground that there was no law in this State, on the 7th day of December, 1905, prohibiting the hunting and killing of a wild deer, was properly overruled for the reasons already stated, viz.: that there was a law prohibiting that act.

Judgment that there is no error in the proceedings below, and that the respondent take nothing by his exceptions. Let execution be done.

JED P. CLARK ET AL. v. HARRIET C. PECK'S EXRS. ET AL.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed November 20, 1906.

Equity—Jurisdiction—Bill to Construe Will—No. 40, Acts 1896—Trusts—Executors—Trustee De Son Tort—Injunction—Multiplicity of Suits—Jurisdiction of Equity in Aid of Probate Court.

The court of chancery can neither restrict nor supplant the jurisdiction of the probate court, nor supervise its action, but can intervene only in aid of that court.

Before the court of chancery will take jurisdiction under No. 40, Acts 1896, providing that "in all cases where the terms of a will are doubtful or in dispute," any interested legatee, devisee, or heir may bring a bill in chancery to have the will construed, it must appear not only that the terms of the will are doubtful or in dispute, and that the orators have the requisite interest, but also that something substantial will be accomplished by the intervention of that court.

In a suit in chancery, under No. 40, Acts 1896, for the construction of a will, brought by the legatees against the executors, the bill alleged that the dispute consists of the claim made by the orators that one of them and his family are entitled, under the will, to certain annuities beginning with the death of the testatrix, which claim is denied by one of the executors, who is the surviving hus-

band of the testatrix, and entitled under the will, as the orators claim, to only the income of the estate during his life, subject to the payment of said annuities, but who claims that, by the terms of the will, said annuities are to begin at his death, and that, if the income of the property is not sufficient for his support, he has a right to use the principal for that purpose; that said executor filed in the probate court, where the estate is in process of administration, a waiver of the provisions of the will in his favor, which waiver is illegal; that said executor is allowed by his co-executors to have the possession and control of the whole estate, which he is squandering. *Held*, on demurrer to the bill, that the court of chancery had no jurisdiction either to construe the will, to enjoin the defendants, or to appoint a receiver and administer the estate.

Since the alleged dispute as to the construction of the will is between the surviving husband and said annuitants, who claim that the waiver of the provisions of the will in his favor, made by the former in the probate court, was illegal, the settlement of the alleged dispute can be of no importance, unless that waiver was in fact illegal, a question which the court of chancery has no jurisdiction to determine.

The mere allegation in the bill that the account filed in the probate court by defendants as executors is "misleading and untrue and in fraud of the rights" of the orators, is only a conclusion of the pleader; the facts should be alleged so that the court may judge whether such conclusion is warranted.

If, as alleged in the bill, said surviving husband's co-executors have allowed him "to control, manage and appropriate to his own use, not only the entire income, but also the principal of the estate," the wrong, if any, is theirs, and they may be removed by the probate court, which has full jurisdiction of that matter.

The allegations of the bill examined and compared and *held* that it does not state in clear and unambiguous language that the surviving husband is wasting and threatening to waste the estate, but that it appears that the estate is and has been in the possession of the executors and properly managed.

If, as alleged in the bill, said surviving husband's co-executors have allowed him "to control, manage, and appropriate to his own use, not only the entire income, but also the principal of the estate," then his possession was rightful and he was not a trustee *de son tort*. *Bailey v. Bailey*, 67 Vt. 494, distinguished and explained.

Equity does not have jurisdiction of all trusts. It has no jurisdiction over trusts given to the exclusive jurisdiction of probate or other courts, nor of money held in trust.

It is not enough to allege that a trust is involved in order to give the court of chancery jurisdiction. It must further appear that the trust is one of which the court of chancery has either conclusive, auxiliary, or concurrent jurisdiction.

As the trust relation involved in this case is that of executor, over which the probate court has exclusive jurisdiction, the court of chancery cannot take jurisdiction on the ground that a trust is involved.

The facts that one of said annuitants is a man eighty years old, and in need of the annuity for his immediate use and support, cannot give the court of chancery jurisdiction on the ground of an inadequate remedy at law.

The evident purpose of the bill is to transfer the settlement of the estate from the probate court to the court of chancery, and no reasons are alleged why that court should take jurisdiction on the ground of preventing a multiplicity of suits, which might not be urged in every testate estate.

APPEAL IN CHANCERY, Chittenden County. Heard at Chambers, November 3, 1905, on demurrer to the bill, *Watson*, Chancellor. Demurrer sustained, and bill adjudged insufficient and dismissed. The orators appealed. The opinion states the material allegations of the bill.

Palmer & Foster and *B. F. Fifield* for the orators.

The fact that Mr. Peck, the surviving husband, has taken actual possession of the property, and taken and received all that he is entitled to under the will, and used the income and some of the principal for his own support, constitute an election on his part to take under the will; and an election once made is binding. *Hutchinson v. McNutt*, 1 Ohio 14; *Wright v. Thomas*, 26 Ohio 346; *Mattocks v. Young*, 66 Me. 459; *Drake v. Wild*, 70 Vt. 52; *Meach v. Meach*, 37 Vt. 414; *Hatha-*

way v. Hathaway, 46 Vt. 234; *Allen v. Knowlton*, 47 Vt. 512; *Childs v. Stoddard*, 130 Mass. 110; *Brown v. Cass*, 4 Wall. 362; *Hartland v. Hackett*, 57 Vt. 92; *Re Blackmier's Est.*, 66 Vt. 46; *White v. White*, 68 Vt. 161.

Hunton & Stickney for the defendants.

The probate court must first be resorted to in all matters pertaining to the settlement of estates; and chancery has no jurisdiction in such matters except in aid of that court. *Missionary Society v. Eells*, 68 Vt. 497; *Ward et ux. v. Church*, 60 Vt. 490; *Blair v. Johnson*, 64 Vt. 598; *Wiley v. Brainerd*, 11 Vt. 107; *Boyden v. Admx. of Ward & Tr.*, 38 Vt. 628; *Kimball v. Kimball*, 19 Vt. 580.

If Mr. Peck is wrongfully in possession of the property, the legal title thereof is in the executors, and they have full power to acquire its possession. *Roy v. Roy*, 13 Vt. 543; *Manwell v. Briggs*, 17 Vt. 176; *Perrin v. Granger*, 33 Vt. 101.

MILES, J. This is a suit in chancery. The question before this Court is raised by demurrer to the bill, and the ground of the demurrer is, that the court of chancery has no jurisdiction.

The allegations of the bill, briefly stated, are as follows: that Harriet C. Peck of Burlington, Vt., died on or about December 25, 1903, leaving a husband, the defendant, Edward W. Peck, but no children surviving her; that she also left a will which was duly proved, allowed and established in the probate court for the district of Chittenden, on the first day of February, 1904, and letters testamentary thereon issued unto Gardner S. Wainwright and Sayles Nichols, nominated in the will as executors thereof, who accepted the appointment, filed a bond thereunder and duly qualified as required by law; that

Jed P. Clark, one of the orators, at the date of the death of Harriet C., was poor and without means of support and a recipient from her of an allowance of fifty dollars per month paid to him regularly; that Edward W., at the time of the death of Harriet C., was wholly without property of his own; that since her death Edward W., as the plaintiffs believe, has used and was still using at the time the bill was brought, to wit, January 4, 1905, large sums of the principal of her estate; that she died owning real and personal property worth two hundred thousand dollars; that this property is now in the possession of Edward W. who intends to keep the same, as the plaintiffs believe, and use it for his own personal benefit and to sell and transfer the notes, stocks and bonds belonging to this estate as he sees fit; that some of the specific provisions of this will are as follows:

"I give to my beloved husband, Edward W. Peck, the possession, management, use, control and income of all my estate, real and personal, during his natural life, subject to the payment of the annuities hereinafter provided."

"It is my will that the annuities now paid and given by me be continued after my decease, out of my estate, and payable in the same manner, and I hereby give the same as follows: To Joseph E. Clark, Dora A. Odlin, William H. Clark and Helen A. Clark, children of my brother, Jed P. Clark, I give an annuity of three hundred dollars each, to be paid to each in quarterly instalments during their respective lives," etc.

"And in case of the death of any of said annuitants leaving issue, it is my will that the annuity theretofore paid to such deceased person, be paid to such issue during life, but in case of such death without issue, then the annuity theretofore paid to such person, shall be continued and paid in equal parts to the survivor or survivors of them. It is my will that the

residue of my property not herein otherwise disposed of, including the residue as it will be after the termination of such annuities, be divided into three equal parts, two parts to be placed in the hands of my executors as trustees to be by them held, managed and controlled and the net income thereof to be paid as follows: Six hundred dollars thereof annually in monthly instalments to my brother Jed P. Clark during his natural life, the balance of the income of said two parts shall be by said trustees applied to the support, care and maintenance of the family of my said brother and this shall be so done by said trustees that said family shall derive the direct and whole benefit thereof."

The bill further alleges, in substance, that Edward W. claims by virtue of the provisions of the will, that he has the right not only to the use of the entire property during his life time, but that, in case the income from that property is not sufficient for his support, he has the right to use the principal, or a part of it, for that purpose; that the executors, Wainwright and Nichols, refuse and neglect to take possession of the estate, and permit Edward W. to control, manage and appropriate the same to his own use, as the plaintiffs believe, and to waste and squander the same to the irreparable loss to the plaintiffs, and that said Wainwright and Nichols are conspiring with Edward W., that he may appropriate to his own use so much of the estate as he may choose to use for his own personal benefit; that Wainwright and Nichols refuse farther to proceed with their duties as executors and assert that Edward W. has the right under and by virtue of the will to manage and control said property; that the only bond filed by Wainwright and Nichols is for the sum of two thousand dollars and is so drawn that no liability whatever attaches by virtue thereof; that Edward W. has made a distribution of certain

portions of the estate and has also given away a part and that after such acts, distribution and gifts, on December 12, 1904, he filed in the probate court his waiver of the provisions of the will and asserts his right to such portion of the estate as by law he is entitled to receive; that Edward W. before filing his waiver, to wit, on the 23rd day of September, 1904, filed in the probate court his petition for an extension of time in which he might waive the provisions of the will and take his statutory rights; that notice thereof was not given to all the parties interested, but was given to one of the plaintiffs, William Odlin, who appeared and objected to the extension of time as prayed for, but such extension was granted, to which said Odlin prayed for an appeal, but the same was refused on the ground that the action of the probate court in matters of that kind was not subject to appeal. The extension of time was made within the eight months prescribed by law in which the husband or wife may waive the provisions of the other's will and the waiver was within the time fixed by the probate court, in which Edward W. was allowed to make his election.

The bill further alleges that Edward W. Peck by his acts and claims made respecting the will, had debarred himself from waiving such will; that he has ever refused to turn over to Wainwright and Nichols any of the property belonging to the estate; that, on the 4th day of February, 1905, Wainwright and Nichols filed in the probate court their accounts and inventory, in which they charged themselves with certain property of the estate, specifically itemized, amounting to one hundred and fifty-five thousand four hundred and thirty-three dollars and twenty cents, and with receipts of property coming to them from various sources, and crediting themselves with property on hand at that date and money paid out in the management and control of this estate, in all amounting to one hundred and

fifty-five thousand four hundred and forty-eight dollars and twenty cents; that the account also showed an itemized statement of the income of the estate since the decease of Harriet C. to the 4th day of February, 1905, amounting to seven thousand and twenty-nine dollars; that the account contained an itemized statement of the money paid on annuities, and advanced to Edward W. and paid out on general expenses by the executors, from the date of their appointment to the 4th day of February, 1905.

The bill contains no statement that the estate consisted of any property, except what is included in the inventory amounting to one hundred and fifty-five thousand four hundred and thirty-three dollars and twenty cents, except the allegations of the plaintiffs above stated, made on information and belief, that Harriet C. died owning property exceeding the value of two hundred thousand dollars. Said bill prayed:

1. For an injunction against the use of any part of the principal of said estate and the change of any place of deposit of books, papers or choses in action.
2. For an accounting of all the assets of said estate.
3. For a receiver to collect and take possession of all the assets of said estate.
4. For an injunction restraining said Edward W. and said executors from having anything to do concerning said estate, or any of its assets.
5. For an appointment of a trustee to take the place of the one named in the will.
6. For an order to compel all persons acting in a fiduciary capacity under the will to give bonds.
7. For a construction of the will.

8. For an injunction against the probate court, to restrain it from taking any action on the waiver of said will by said Edward W.

9. For an injunction against said Edward W. restraining him from prosecuting his said waiver of said will.

10. For an accounting by said Edward W. of all the estate committed by the testatrix to his possession, control, use and management.

11. For general relief.

The orators contend that the court of chancery has jurisdiction of the matters set up in the bill, for several reasons:

First: Because the terms of the will, as shown by the portion thereof above quoted, are in dispute and because the orators are interested in the estate as legatees. They base this contention upon No. 40 of the Vermont Session Laws of 1896, sec. 1, which reads as follows: "In all cases where the terms of a will are doubtful, or in dispute, any person interested in the estate, either as legatee, devisee or heir at law, may bring a bill in chancery to have the will construed, and the court of chancery or the Supreme Court on appeal shall proceed to construe the will, which decision shall be binding upon the parties who are served with process and who appear in the case by counsel, notwithstanding it appears that others may at some future time become interested under the will." They urge that the dispute as to the terms of the will consists in a claim made by orators that Jed P. Clark and family are entitled to an annuity commencing with the decease of Harriet C., which they allege is denied by Edward W. who claims that said Jed P. Clark is not entitled to his annuity until the death of Edward W.

The statute above quoted, undoubtedly, was enacted for the purpose of serving some material and substantial end in the

settlement of a testator's estate. Such being its object, in order to give the court of chancery jurisdiction, it must appear, that in addition to the fact that the terms of the will are in dispute, and that the parties seeking to have the construction made are interested as legatees, devisees or heirs at law, that some substantial end will be accomplished by the court of chancery in construing the will. Does such result appear to necessarily follow a construction of this will, from any allegation in the bill before us? The dispute respecting the construction of the will, if one exists, is between the orators and the defendant, Edward W., and if its settlement is important, it is because Edward W. claims adversely to Jed P. and his family; and, if he claims adversely to Jed P. and his family, it is because he claims under the provisions of the will. To determine this, it is necessary to settle the question of whether Edward W. claims under the provisions of the will or under the law, independent of the will; for if he claims under the law, and not under the will, then there is no dispute existing between him and Jed P. and family, and whatever he may claim with respect to the provisions of the will, is but a mere expression of opinion by a disinterested party who is in no way affected by any provision in the will. Therefore, before the court of chancery can determine whether there is such dispute with reference to the terms of the will, as contemplated in the above section, it must settle the question of whether Edward W. has or has not legally waived the provisions of the will. The question then arises, has the court of chancery jurisdiction of *that* question? If the court of chancery has jurisdiction of *that* question, then it has jurisdiction of such a question whenever it arises in the settlement of a testator's estate.

No authorities have been cited by the orators showing such jurisdiction in the court of chancery, and we think none can

be found. Possibly, if that question had been settled in the probate court and it had been found there, that Edward W. had not legally waived the provisions of the will, but had elected to take under it, that this court might have jurisdiction to construe the will, which we do not decide; but, in order to entitle the orators to the aid of the court of chancery, they must have proceeded far enough in the law court to have disclosed to the court of chancery the necessity for its aid. *Blair v. Johnson*, 64 Vt. 598; *Morse v. Lyman*, 64 Vt. 167; *Harris v. Harris*, 79 Vt. 22.

From the bill it appears that the probate court has passed upon the right of Edward W. to waive the provisions of the will so far as they relate to him, and has extended the time in which he could exercise that right, and that the right has been exercised by him within that time. The orators argue that the court of chancery has jurisdiction on account of this action of the probate court upon this matter, and assign as a reason for such jurisdiction, that the probate court had no right to grant the extension of time in which to make the election, and that the election must have been made within twenty days from the probate of the will, and because the orator, Odlin, who appeared and objected to the extension and prayed for an appeal from that decision of the probate court was unjustly denied such appeal.

If the orators have been denied their right of appeal, their remedy is not by application to the court of chancery. The Vermont Statutes, sec. 1665, have provided a remedy for such a case, a remedy which is ample and complete. To hold with the orator's contention, would give to the court of chancery a revisory power over the action of the probate court, a conclusion wholly at variance with the settled holdings of this Court. If the probate court has committed any error respect-

ing any of these matters, with reference to which we have not examined, no reason is shown by the bill why those questions cannot be brought to this Court in regular manner through the county court. The probate court having passed upon the right of Edward W. to elect whether he would or would not waive the provisions of the will, the court of chancery has no jurisdiction to revise that decree. *Wood v. Church*, 66 Vt. 490. When all these questions are settled in the proper manner, if it is found that Edward W. has or has not elected to take under the will, and it becomes necessary to construe the will, there will be ample time in which to resort to the court of chancery for a construction of its terms, if a case arises wherein the court of chancery has jurisdiction under the statute.

As it does not clearly appear from the allegations in the bill that there is a dispute between the orators and Edward W. which is essential to the settlement of the estate, we hold, that the court of chancery has no jurisdiction upon this ground. For a further discussion respecting the scope and construction of No. 40, of the Acts of 1896, see *Harris v. Harris*, *supra*.

Second: The orators contend that the court of chancery has jurisdiction, because an injunction is necessary to prevent irreparable loss and injury. This contention rests upon the allegations in the bill, to which resort must be had to determine whether the court of chancery has jurisdiction for that purpose.

The right of the court of chancery to interfere by injunction, in a case where the probate court has not adequate power to give full and complete relief, cannot be disputed; but it must appear from the bill that such interference is necessary, before chancery can give its aid. The court of chancery cannot exercise any supervisory jurisdiction nor restrict or supplant the jurisdiction of the probate court. It must act, if at all, in

aid of that court. *Merriam v. Hemenway*, 26 Vt. 565; *Boyd v. Ward*, 38 Vt. 628; *Adams v. Adams*, 22 Vt. 50; *Wood v. Church*, *supra*. The question then arises, do the allegations of this bill show a necessity for the interference of a court of chancery and the exercise of its powers to grant an injunction?

The bill clearly shows that the only object in securing the injunction, is to restrain Edward W. from disposing of any of said estate and from destroying any of the books, papers, vouchers or memoranda of any kind relative to said estate.

If the bill clearly showed that there was danger that Edward W. was about to use the estate or was destroying or threatening to destroy any books, papers, vouchers or memoranda of the estate to the irreparable injury thereof, and that the probate court had no jurisdiction to prevent it, possibly, the court of chancery might grant an injunction in aid of such court; but we are not called upon to decide that question, for when we look into the allegations of the bill we do not think that it discloses any such danger. On information and belief it is alleged, that Edward W., at the date of the bill and from the death of Harriet C., had the possession of the estate and was using and squandering the same; but later allegations contradict this statement and there is no allegation that he was about to destroy or remove the books, papers, vouchers or memoranda of the estate beyond the reach of the probate court.

This allegation, on information and belief must be construed with the positive allegation, in another part of the bill, wherein it is alleged that the executors, defendants Wainwright and Nichols, have filed their account in the probate court for the district of Chittenden, in which account they charge themselves with the entire estate, as above stated, showing the income of the estate and the receipts thereof for the

year preceding the settlement and covering the time intervening between their appointment and the date of the settlement, and their disbursements on account of the management of the estate for that period of time, including the amount advanced to Edward W. during that time, being in all advanced to him only the sum of two thousand four hundred and ten dollars and nineteen cents. While the bill contains an allegation that the settlement was made to aid Edward W. and in collusion with him, it does not appear wherein it aids him or in what respect it is collusive, and no allegation is made in the bill that it does not disclose all the estate or is in any respect inaccurate, and no appeal is alleged to have been taken to that settlement.

Now, this positive allegation, setting out the account of Wainwright and Nichols, in which it appears that they have had the possession, management and control of the estate of Harriet C., instead of Edward W., from the time letters of administration were granted to them, until they filed their account, and had delivered to Edward W. only the sum of \$2410.19 during that time, substantially cancels the allegation made on information and belief, that Edward W. was in the possession of the estate and was wasting the same. This effect is not prevented by the statement in the bill, that the account is "misleading and untrue and in fraud of the rights" of the petitioners. Such statement is only a conclusion from facts not stated. The bill does not show wherein it is "misleading and untrue and in fraud of the rights" of the petitioners. The account stated moreover bears upon the face of it, the appearance of a straightforward, true and just account, and discloses the possession and management of the estate to have been that of the executors, Wainwright and Nichols. If, however, the actual management and possession of such estate is and had been in Edward W. since the granting of letters

testamentary to the executors, the allegation on information and belief contained in the plaintiff's bill, that Wainwright and Nichols "have at all times permitted Edward W. Peck to control, manage and appropriate to his own use, not only the entire income, but also the principal of the estate," clearly confers upon Edward W. a legal right to the possession and, if the estate is being misappropriated, it is because the executors are permitting it to be done, and the wrong, if any, is theirs; because what is being done by Edward W. with their consent and permission, in law, is being done by them, who are charged with the due and proper settlement of that estate; and, if they neglect faithfully to perform their duty in this respect they may be removed by the probate court, who may appoint a successor who will perform those duties, sec. 2384 and 2380 V. S. From anything that appears in the bill, all that could be accomplished by injunction, can be accomplished by the executors withdrawing their permission to Edward's possession and use of the estate, and taking possession thereof; and, if they refuse to do so, and such action is necessary for its due administration a full and ample remedy is possessed by the probate court who can remove them and appoint others who will, and thus correct the wrong, if any exists, in a much speedier and simpler manner than by bill of injunction. We, however, do not think in view of the positive allegation in the bill, setting out said executor's account as above stated, that the bill states a case in clear, positive and unambiguous language, showing that Edward W. has the possession of the estate and is wasting or threatening to waste the same; but we think it rather appears, that the possession is and has been in the executors all the time and that it has been and is being properly managed, as shown by their account set out in

the bill. From the foregoing reasons, it follows, that the court of chancery has not jurisdiction under the allegations in this bill to grant the injunction prayed for.

Third: The orators further contend, that the court of chancery has jurisdiction, because a constructive trust is to be enforced and a trustee *de son tort* compelled to account. A full answer to this contention is, that the bill does not show in clear terms that Edward W. was a trustee even, much less a trustee *de son tort*; for, as already stated, his possession, if he had any, was rightful and with the permission of those having the legal right to such possession. Being rightful he was not a trustee *de son tort*. *Bailey v. Bailey*, 67 Vt. 494. The plaintiffs rely principally, if not solely, upon this case of *Bailey v. Bailey*, as sustaining their contention upon this point. That case is clearly distinguishable from the case at bar. In that case the object sought was to have a son and widow account in chancery for the management of the property of the insane father and husband, for a period of twenty or more years before his death. There was no question but that the defendants in that case had the possession of the property for that length of time and that that possession was without legal right. The widow was the administratrix of her husband's estate and the son had presented a claim against that estate, which was allowed by the commissioners and an appeal taken in the name of the administratrix, by one of the heirs, who, with other heirs, brought that chancery proceeding pending the appeal. The question there as here, was as to the jurisdiction of the court of chancery. The decision was by a divided court which held, that the son and widow were guardians or trustees *de son tort* of the insane father during his life time; and the greater part of the opinion is devoted to the discussion of that question. That case further held, that being guardians or

trustees *de son tort*, the probate court had no power to cite them before it to settle their accounts, and, therefore, the aid of the court of chancery might well be invoked. In that case the trust relation had been maintained without the semblance of right for a period of twenty or more years, and had terminated before the probate court had taken jurisdiction of the settlement of the estate, and during the continuance of that relation, there was no legal representative to take note of what was being done, or to keep any account of the transactions of the self-constituted guardians. Such guardians had the sole information from which an account could be made. Had the insane person recovered his reason before his death, he could, under the doctrine disclosed in the cases cited in the opinion of that case, have maintained a bill in chancery for a discovery and to account. His representative succeeded to all the rights which he had in his life time. The cause was complete before the settlement of the estate became pending in the probate court and did not grow out of that settlement. It was simply a chose in action belonging to the estate, which could be enforced in any proper tribunal. In the case at bar, the matter of complaint arose after the settlement of the estate became pending in the probate court and is a part and grew out of the management of that estate in the course of its settlement; and during the transactions constituting that matter, there have been representatives of said estate having full knowledge of what has been taking place with reference to said estate, and who have kept full, specific and complete account of all matters relating to the management, control and disposal of the property of the estate, and what Edward W. has done, if anything, having been done with the permission of the executors, must, of necessity, be a part of the account of the executors, of which the probate court has exclusive jurisdiction, and besides, the

possession of Edward W., if any he had, was rightful. It therefore is apparent, that the case of *Bailey v. Bailey*, *supra*, so different in all its essentials, is not authority for the claim made by the orators.

The orators strenuously urge upon us that the relation of Edward W. to the estate of his wife, Harriet C., is that of a trustee, and that courts of equity have original jurisdiction of trusts and because of that it has jurisdiction of the case at bar. That courts of equity do have original jurisdiction of some trusts is undoubtedly true; but it does not follow from that that such court has jurisdiction of all trusts. Such as are given to other courts form an exception; and among those, are trusts exclusively given to the jurisdiction of the probate court. Money held in trust is another exception. *Downs v. Downs*, 75 Vt. 383, and cases cited in the opinion. Other instances might be cited, but the above is sufficient to show that it is not enough to allege that a trust is involved in order to give the court of chancery jurisdiction. It must further appear that the trust is either one of which the court of chancery has exclusive, auxiliary or concurrent jurisdiction. As the trust relation in the case at bar is that of an executor over which jurisdiction is exclusively given to the probate court, it follows, that the court of chancery has not jurisdiction on the ground that a trust is involved.

Fourth: The orators contend that a court of chancery has jurisdiction, because they have no adequate legal remedy. They say this is so, because the plaintiff, Jed P. Clark, is an old man eighty years old, and in need of the annuity for his immediate use and support. It is needless for this Court to call attention to the fact that the court of chancery is not a law making body, but is bound to follow the law as it finds it, to the same extent that courts of law are required to follow it,

and therefore it can consider the rights of one person in no different light than those of another, whatever the age and condition of that person, and the jurisdiction of the court of chancery rests upon no such uncertain grounds; but they say, the court of chancery has jurisdiction to call Edward W. to account and the probate court has not that power, because he is a trustee *de son tort*. This contention is practically answered in what we have said in the earlier part of this opinion, viz.: that the bill does not show that Edward W. is the wrong doer, but the wrong, if any, is that of the executors who are subject to the order of the probate court whose jurisdiction is ample, speedy and less expensive than that of the court of chancery. *Boyden v. Wood*, 38 Vt. 628. This position is clearly insufficient to give jurisdiction to the court of chancery in the case at bar.

Fifth: The orators claim that the court of chancery has jurisdiction to prevent Edward W. from electing to waive the will and from contesting that question in the probate court. It is a sufficient answer to this claim, that the bill shows no equitable ground or reason why the court of chancery should attempt to interfere, by restraining order or otherwise, in a matter over which the probate court has full jurisdiction and of which it has power to give an ample remedy, and in which the bill shows, it has acted.

Sixth: The orators further claim that the court of chancery has jurisdiction because a conspiracy exists between the executors and Edward W. to rob the estate. A full answer to this claim is shown in what we have said in the earlier part of this opinion with reference to calling the executors to account, removing them and the appointment of others in their stead.

Seventh: The last ground urged by the orators upon which they claim jurisdiction for the court of chancery, is, that it will prevent a multiplicity of suits. This point is not well taken. There are no special reasons alleged why the court of chancery has jurisdiction in this case, on the ground of preventing a multiplicity of suits, which might not be urged in every testate estate.

The evident purpose of the bill is to transfer the settlement of this estate from the probate court to the court of chancery. This could not be done without overruling a long line of authorities and a well settled practice in this State. The court of chancery can only exercise its functions in proper cases in regard to probate matters. It can only aid that court, and merely furnishes auxiliary powers when the functions of the probate court are inadequate. *Adams v. Adams*, 22 Vt. 50; *Merriam v. Hemenway*, 26 Vt. 565; *Boyden v. Wood*, 38 Vt. 628; *Blair v. Johnson*, 64 Vt. 598; *Missionary Society v. Eells*, 68 Vt. 497. For further discussion upon this point see *Harris v. Harris*, *supra*.

Decree affirmed as of January Term, 1906, and cause remanded with mandate to enter a decree according to mandate as of March Term, 1906, with costs in this Court.

MARTIN MCGOWAN v. FRANK B. BOWMAN, AND TRUSTEES.

January Term, 1905.

Present: ROWELL, C. J., MUNSON, STARR, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed November 20, 1906.

Pleading—Discharge in Bankruptcy—Evidence.

The fact that, at the trial of an action of assumpsit before a justice, defendant's counsel stated that defendant was in bankruptcy and moved for a verdict, did not operate as a stay of proceedings.

In an action of assumpsit, where the evidence relevant to the issues made by the pleadings was received without exceptions, and on those issues the court found against the plaintiff, judgment for the defendant to recover his costs was properly rendered, notwithstanding some evidence not relevant to said issues, and not prejudicial, was received under general objections and exceptions.

GENERAL ASSUMPSIT to recover the amount of a grocery bill, begun by trustee process. Plea, discharge in bankruptcy, as of April 19, 1901. Replication, that the discharge does not affect goods in hands of trustees in suit commenced March 25, 1901, that said lien was not obtained while defendant was insolvent and will not work a preference; that plaintiff had no reason to believe defendant insolvent, that said lien was obtained in good faith for actual value without notice or reasonable cause for inquiry respecting bankruptcy, and that defendant did not permit, while insolvent, plaintiff to obtain his preference. Rejoinder, "That the said lien in said replication mentioned was obtained in a suit which was begun against the defendant within four months before the filing of a petition in bankruptcy by him, and said lien was obtained and permitted while the defendant was insolvent and its existence and en-

forcement will work a preference in favor of the plaintiff over the other creditors of the defendant," etc. Surrejoinder, "Although it be true that said lien in said rejoinder mentioned, was obtained in a suit which was begun against the defendant within four months before the filing of a petition in bankruptcy by him, yet, this plaintiff says, that he ought not to be barred from having and maintaining his aforesaid action against the said defendant by reason of anything by the said defendant in said rejoinder alleged, because he says, that said lien was not obtained and permitted while the defendant was insolvent, and its existence and enforcement will not work a preference." Trial by court at the September Term, 1904, Washington County, *Tyler, J.*, presiding. Judgment for the defendant to recover his costs. The plaintiff excepted.

The facts found by the court are as follows:

"The action was brought before a justice of the peace of the city of Barre, and judgment rendered thereon for the plaintiff, the 20th of April, 1901, for \$41.21 damages and \$7 costs. The defendant took an appeal to the county court and gave recognizance for costs. At the justice trial, the defendant's counsel stated that the defendant was in bankruptcy, and moved for a continuance. It did not appear that the plaintiff, as a creditor of the bankrupt, had any notice of the bankruptcy proceedings other than the statement of the bankrupt's attorney before the justice and the suggestion of the bankruptcy in the county court. The plaintiff did not appear nor file his claim in the bankrupt court. In this Court, the defendant filed a plea, which, with all the pleadings, is referred to and made a part hereof. The defendant's certificate showing a discharge in bankruptcy was offered in evidence by the defendant, and admitted, and is made a part hereof. Edward H. Deavitt, referee in bankruptcy, to whom the bankruptcy case of the

defendant was referred by order of the bankruptcy court, testified, under the plaintiff's objection and exception, that a petition in bankruptcy was filed by defendant in case No. 747, and referred to him as referee; that he did not know the signature of the defendant, but that the petition and schedule bore the signature of the clerk of the court in the filing on the petition, which signature was known by the referee to be the clerk's signature; that the defendant was the person who appeared before him as the bankrupt in said bankruptcy case; that a petition for discharge, purporting to be signed by the defendant, was received by him through the mail from the clerk. Mr. Deavitt testified that he did not know the signature to the petition was that of the bankrupt, but did know that the signature of the clerk contained in the filing on the outside of the petition was the signature of the clerk, George E. Johnson. Mr. Deavitt testified that the signature upon the certificate of discharge by the clerk was the signature of the clerk, George E. Johnson. The defendant claimed that the discharge in bankruptcy was a bar to the plaintiff's recovery in this suit. It appeared that the discharge was granted November 26, 1902. There was no proof of the actual filing of the petition in bankruptcy, further than what appears by the certificate of discharge, and Mr. Deavitt's testimony. It appeared by evidence not excepted to that at the time this suit was brought and at the time of the trial before the justice the defendant's liabilities amounted to \$500 and that he had no assets excepting wages to the amount of \$40 then due to him from McDonald & Cutler, his employers. It did appear, through the testimony of Edward H. Deavitt, that five debts, to the amount of \$41.73, were approved in the bankruptcy case of the defendant before Edward H. Deavitt, the referee. It did not appear in evidence that the plaintiff knew, or had cause to believe, when he brought

this suit that the defendant was insolvent. It was admitted by the plaintiff that the plaintiff's claim against the defendant was properly scheduled in the defendant's bankruptcy petition, and in time for proof and allowance. The plaintiff moved on all the evidence that he was entitled to judgment for the amount of his claim and costs; that on the foregoing facts he was entitled to such a judgment; that in any event no judgment should be rendered against him, and that such a judgment should be rendered for him as would bind the surety on the appeal for the costs made by the appeal from the justice's judgment. No evidence was offered by either party tending to show that the plaintiff had any actual notice of the bankruptcy proceedings except as hereinbefore stated and the suggestion of bankruptcy in the county court, March Term, 1901, as appears by the docket entries in this case which are referred to and made a part hereof. There was no evidence offered tending to show whether the plaintiff appeared in the bankruptcy case or proved his claim therein." The trustees were McDonald & Cutler, defendant's employers.

Gordon & Jackson for the plaintiff.

The discharge in bankruptcy does not forbid litigation to this extent, but on the other hand permits it. Therefore, the court had no right to render the judgment it did. It should have rendered judgment for the amount of the plaintiff's claim, and then if it adjudged the plea of discharge sufficient, should have ordered a perpetual stay of the execution. *Hill v. Harding*, 116 Ill. 98; *Byers v. First Nat'l Bank*, 85 Ill. 426; *Hill v. Harding*, 130 U. S. 699.

Burton E. Bailey and *Edward H. Deavitt* for the defendant.

The only issues made by the pleadings were the insolvency of defendant when the suit was begun, and whether the enforcement of the lien of the trustee process would work a preference in favor of plaintiff. The court found both these issues in favor of defendant upon evidence received without exception; hence, under §67c of the Federal Bankruptcy Act the lien was dissolved. Abbott's Trial Brief, 295, 299, 301; *McDonald v. McDonald*, 16 Vt. 630.

Under §67f said lien was dissolved, regardless of the issues made by the pleadings. *In Re Goldberg*, 10 Am. B. Rep. 97; *Bryan v. Bernhirmer*, 181 U. S. 188; *In Re Kenney*, 3 Am. B. Rep. 353; *Metcalf v. Barker*, 187 U. S. 165; *Thompson v. Fairbanks*, 75 Vt. 361; *In Re Kemp*, 4 Am. B. Rep. 242.

Costs, whether accruing before or after the adjudication of bankruptcy follow the debt, and a certificate of discharge bars not only the debt but the costs as well. *Harrington v. McNaughton*, 20 Vt. 293; *Donner v. Rowell*, 26 Vt. 397; *Stockwell v. Woodward*, 52 Vt. 228.

HASELTON, J. This was general assumpsit brought by the plaintiff against the defendant to recover the claimed amount of a grocery bill. The case was brought before a justice of the peace of the city of Barre. At the trial before the justice the defendant's counsel stated that the defendant was in bankruptcy and moved for a continuance. This statement of counsel could not, however, legally operate as a stay of proceedings. The case went on and upon April 20, 1901, judgment was rendered for the plaintiff for \$41.21 damages and \$7.00 costs. The defendant appealed to the Washington County Court. At the September Term, 1904, of that court trial was had by the court and judgment was rendered for the defendant to recover his costs. The pleadings as finally

made up consisted of the declaration, a plea of discharge in bankruptcy, a replication, a rejoinder in which the defendant prayed judgment and for his costs; and a surrejoinder in which the plaintiff prayed an inquiry by the country.

At one time the pleadings were different, but the earlier pleadings subsequent to the declaration had all been withdrawn, and on trial there was no general issue in the case, nor any pleadings other than those above designated. The issues made by these pleadings were: 1. Was the defendant insolvent at the time of the commencement of the suit by trustee process? and, 2, would the existence and enforcement of the plaintiff's lien acquired by the service of the trustee process work a preference?

Some evidence, not relating to the issues which the pleaders had chosen to make, but not prejudicial, was received under general objections and exceptions. These need not be considered.

The evidence relevant to the issues in the case was not excepted to, and on these issues the court, in effect, found against the plaintiff, and judgment for the defendant to recover his costs was properly rendered.

The plaintiff in argument raises various questions which under the pleadings need not be considered.

Judgment affirmed.

SARAH E. P. HEATH, BY HER GUARDIAN v. CAPITAL SAVINGS
BANK & TRUST CO. ET AL.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed November 20, 1906.

*Bill in Chancery—Demurrer for Want of Equity—Multiplicity
of Suits—Vexatious Litigation—Undue Influence.*

Undue influence is either a species of fraud, or a kind of duress. In either case it comes in for the same consideration as fraud in general.

To warrant the dismissal of a bill for want of equity, it is not enough that the orator has a remedy at law; it must be plain and adequate, and as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity.

A bill in equity alleged that the defendant bank holds a certain note signed by the oratrix and another defendant, and two notes signed by the oratrix alone, and as collateral security for the payment of those notes, that said bank holds certain property of the oratrix; that the oratrix never received any consideration for signing said notes, but that the whole consideration was taken by said other defendant, who induced the oratrix, who was mentally weak and incapable of contracting, to sign said notes and to pledge said collateral security, by the exercise of undue influence, all of which said bank well knew when it received said notes and collateral; that said bank threatens to sue the oratrix on said notes and to hypothecate said collateral security, and praying that said bank may be enjoined from carrying out those threats, and for a decree relieving the oratrix from liability on said notes, and for the return of said collateral security. *Held*, that the bill was not demurrable for want of equity.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the March Term, 1905, Washington County, *Munson*, Chancellor. Decree, strictly *pro forma*, sustaining the demurrer

and dismissing the bill. The orator appeals. The material allegations are stated in the bill.

Heaton & Thomas and *Geo. W. Wing* for the orator.

Courts of equity always have jurisdiction in cases of fraud, except in cases of obtaining a will by fraud. Story Eq. Jur. §184; *Chesterfield v. Janssen*, 2 Ves. 155.

The adequacy of a legal remedy is not presumed, and equity will take jurisdiction where it is doubtful, or where the court is not satisfied that the plaintiff could be remitted to law without injustice. Bispham's Prin. of Eq., 7th ed., §200, p. 304; *Dwinall v. Smith*, 25 Me. 379; *Ankrim v. Woodworth*, Har. (Mich.) 355; *Gregor v. Howell*, (Iowa) 1902, 91 N. W. 778; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Stockwell v. Fitzgerald, et al.*, 70 Vt. 468; *Viele v. Hoag*, 24 Vt. 46; *Rutland R. R. Co. v. Chaffee et al.*, 72 Vt. 404.

Equity has jurisdiction of this case on the ground of avoiding a multiplicity of suits. *Rynearson v. Turner*, 52 Mich. 7; *Biddle v. Ramsey*, 52 Mo. 153; *Walker v. Cheever*, 35 N. H. 339.

T. J. Deavitt and *Edward H. Deavitt* for the defendants.

The oratrix has ample remedies at law. (1) If, as the bill alleges, there is lacking the capacity to make a binding contract, that is a good defence to an action at law. *Pomeroy Spec. Perf.*, §§53, 54; *Foot v. Tewksbury*, 2 Vt. 97; *Barrett v. Buxton*, 2 Aik. 167. (2) If the bank is about to dispose of the securities, the oratrix can demand their return, and if refused, maintain trover.

Even if the bill alleges fraud, that is not of itself ground for relief in equity. *Pomeroy Spec. Perf.*, §49; 1 *Pomeroy*

Eq. Jur., §178; *Ins. Co. v. Bailey*, 13 Wall. 616; *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288; *Riggs v. Union Life Ins. Co.*, 129 Fed. 207 (Mo.).

The bill does not show such a situation as calls for the interposition of equity to prevent a multiplicity of suits. 1 Pomeroy Eq. Jur., §§251, 252, 263, 264; *Eldridge v. Hill*, 2 Johns. Ch. 281; *West v. New York*, 10 Paige 539; *Richmond v. Dubuque S. R. Co. et al.*, 33 Iowa 422; *Fellows v. Spaulding*, 141 Mass. 89; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71; *Dyer v. School District*, 61 Vt. 96.

HASELTON, J. This is a bill in equity brought against the Capital Savings Bank and Trust Company, Julia Kane, and Barton B. Gale, trustee in bankruptcy of the estate of said Julia Kane. The defendant bank demurred to the bill for want of equity. The demurrer was sustained strictly *pro forma* and the bill dismissed. The orator appealed.

The bill alleges such mental incapacity on the part of Mrs. Heath as made and makes her incapable of contracting or of caring for her property. It further alleges that the defendant bank is the holder of a note for \$1,300, signed by her and the defendant, Julia Kane, and of two notes which, taken together, are for \$1,400, signed by Mrs. Heath alone; and that as collateral security for the payment of these notes above mentioned, the bank holds a note belonging to the oratrix for the sum of \$1,500, signed by Arabella Blanchard, George Blanchard, Fred Blanchard, and Willis Blanchard, and a cash deposit in the defendant bank of about \$1,000, and the bank book representing such deposit; that Mrs. Heath never received any consideration for the notes signed by her as aforesaid, but that the entire consideration therefor was taken by the defendant Julia Kane; that Mrs. Heath was induced to sign the notes bearing

her signature and to place with the bank the collateral security above referred to wholly by reason of undue influence practiced upon her by the said Julia Kane, while Mrs. Heath was in the mental condition alleged as hereinbefore stated.

The bill further sets out that the defendant bank took the three notes signed by Mrs. Heath and the collateral security referred to with full knowledge of the mental condition of Mrs. Heath, knowing that she was receiving no consideration, and knowing that she had been induced to sign the notes bearing her signature, and to place with the bank the collateral security it was taking, by reason of undue influence practiced upon her in the mental condition in which she was, and in which the bank knew she was.

The bill sets out that the defendant bank is threatening to sue Mrs. Heath on the notes signed by her, to commence action on the collateral note and make collection thereon, and to assign to others and hypothecate the collateral security held by the bank as hereinbefore stated, and that the oratrix believes and has reason to believe that the bank is about to carry out its threats, and avers danger of being subjected to a multiplicity of suits unless she can obtain relief in equity.

The bill shows that the oratrix is under guardianship and that the said Julia Kane is in bankruptcy.

There is a prayer that the defendant may be enjoined from carrying out its threats alleged as above stated, for a decree relieving the oratrix, her guardian and estate, from liability on the notes bearing her signature, for the delivery to the oratrix of the collateral security herein mentioned, and for general relief.

Undue influence is either a species of fraud, or a kind of duress. In either case it comes in for the same consideration

as fraud in general. *Harding v. Handy*, 11 Wheaton 103; *Central Bank v. Copeland*, 18 Md. 305; S. C. 81 Am. Dec. 595.

The knowledge which the bill imputes to the bank at the time it took the three notes signed by Mrs. Heath and at the time it took her property as security therefor, and the action which it is charged to be about to take with reference to such notes and security, put the bank in the attitude of endeavoring in an unconscionable manner to consummate the wrongful deprivation of Mrs. Heath of her property.

It does not appear by the allegations of the bill whether the notes therein mentioned are or are not overdue, but it sufficiently appears that if left to her remedy at law, the oratrix will necessarily be a party to vexatious litigation, if equity does not interpose, whether or not she is in danger of being involved in a multiplicity of suits.

In considering whether the oratrix has an adequate remedy at law, what was said in an early case by the Supreme Court of the United States, is peculiarly applicable here. "It is not enough," said that Court, "that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. 210.

We hold that on the facts admitted by the demurrer, the oratrix has not an adequate remedy at law, and that she is entitled to relief under the bill as framed.

The case is well within the principles of various decisions of this Court. *Viele v. Hoag*, 24 Vt. 46; *Glastenbury v. McDonald*, 44 Vt. 450; *Morse v. Morse*, 44 Vt. 84.

The pro forma decree is reversed, the demurrer is overruled, the bill adjudged sufficient, and the cause remanded.

STATE v. LOUIS SHAPPY, JR.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed November 20, 1906.

Intoxicating Liquors—No. 115, Acts 1904—Relative Jurisdiction of Municipal Courts and Justices of the Peace—Illegal Furnishing—Motion in Arrest of Judgment—Scope and Effect—Question of Jurisdiction Raised Thereby.

A motion in arrest of judgment can be based only on matters apparent on the face of the strict record; therefore, lack of evidence to sustain a verdict cannot be considered under such a motion.

The question of a court's jurisdiction of the subject-matter of a cause may be raised at any stage of the trial, and whenever and however it is brought to the attention of the court it must be considered; it may, therefore, be raised by a motion in arrest of judgment.

No. 115, Acts 1904, regulating the traffic in intoxicating liquor, puts justices of the peace and city and municipal courts on the same footing as to their jurisdiction of offences against the provisions of the Act. Section 103 provides that they shall have concurrent jurisdiction with the county court of offences of being found intoxicated, and section 114 provides that in all prosecutions under the Act, "except for intoxication, and where the respondent enters a plea of guilty," such courts may exercise the jurisdiction of courts of inquiry. Hence, the city court of the city of St. Albans, on a plea of not guilty to an information charging the illegal furnishing of intoxicating liquors, can proceed as a court of inquiry only, notwithstanding the city charter gives that court jurisdiction to "try and determine all prosecutions for such criminal offences committed within the city as are not punishable by death or imprisonment in the state prison."

INFORMATION for furnishing intoxicating liquor in violation of No. 115, Acts 1904. Plea, not guilty. Trial by jury in the City Court of the city of St. Albans, *Tillotson*, Judge. Verdict, guilty; and judgment thereon. The respondent excepted. The respondent moved the court to arrest judgment for want of jurisdiction. Motion denied, to which the respondent excepted.

The charter of the city of St. Albans is No. 150, Acts 1896. Section 40 provides: "The city court may try and determine all prosecutions for such criminal offences committed within the city as are not punishable by death or imprisonment in the state prison."

H. M. Mott for the respondent.

Warren R. Austin, State's Attorney, for the State.

HASELTON, J. This was a complaint for furnishing intoxicating liquors contrary to law, tried by jury in the City Court of St. Albans. A verdict of guilty was returned, whereupon the respondent moved in arrest of judgment. The motion was overruled, the respondent excepted and the case was passed to this Court before judgment and sentence.

One ground of the motion in arrest was that there was no evidence tending to prove the respondent guilty. It was early settled at common law that a motion in arrest of judgment could only be for matters apparent on the face of the strict record in the case. See cases in *Salkeld* and *Lord Raymond*. We say nothing of "pleading in arrest of judgment," the history of which is somewhat obscure, a practice which in a manner survived in the method of praying benefit of clergy and that of taking advantage of a pardon granted before judgment and sentence. In this State the common law in respect

to the scope of motions in arrest of judgment has been adhered to. Lack of evidence to sustain a verdict can not be considered under such a motion, for though the evidence be set out in the bill of exceptions, it is no part of that record proper which alone is brought in review by a motion in arrest. *State v. Thornton*, 56 Vt. 35; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12; *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633; *Railroad Co. v. Macchi*, 74 Vt. 403, 52 Atl. 960.

Any departure from the practice of confining a motion in arrest to its proper office would be a confusing and inconvenient disregard of precedent. The trial court and litigants would often be in doubt as to what would and what would not be treated as a question raised below and reserved by exception. The first ground on which the motion in arrest is based can not be considered.

A second ground of arresting judgment set out in the motion in arrest is want of jurisdiction on the part of the City Court of St. Albans to try said cause. The question of the jurisdiction of a court over the subject-matter of a cause may be raised at any stage of a trial, and whenever and however it may be brought to the attention of the court it must be considered, and it is well enough raised by a motion in arrest when the matter relied on appears upon the face of the record. To quote from Comyn's Digest, "After verdict a man may allege anything in the record in arrest of judgment which may be assigned for error after judgment." Com. Dig. "Pleader," S. 47. The statement of Stephen is this: "Again an unsuccessful defendant may move in arrest of judgment; that is, that the judgment for the plaintiff be arrested or withheld, on the ground that there is some error appearing on the face of the record, which vitiates the proceedings. In consequence of such error, on whatever part of the record it may

arise, from the commencement of the suit to this period, the court are bound to arrest judgment." Stephen's Pl. 96.

Gould uses the following language: "In regard to the arresting of judgment after verdict, it is a universal rule that any defect in the record which would render a judgment in pursuance of the verdict erroneous, is a sufficient ground for arresting the judgment. For no court should do so nugatory an act as to render a judgment which when rendered must be erroneous." Gould's Pl., ch. X, § 10.

The true doctrine is fully recognized and stated in *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12, and none of our cases have departed from it; although in the opinions in *State v. Thibeau*, 30 Vt. 100, and *Waite v. Starkey*, 68 Vt. 181, 34 Atl. 692, expressions are used which taken by themselves would unduly restrict the office of a motion in arrest. These expressions occur in the course of sound decisions properly excluding certain matter from the purview of a motion in arrest, and are seen to have been inadvertent upon examination of Vermont cases in each instance cited. For the purposes of a motion in arrest "the record" means in this State all that it meant at common law and no more.

In harmony with the essential principle of a motion in arrest are cases directly to the point that want of jurisdiction apparent on the record is proper ground for arresting judgment. *Truitt v. People*, 88 Ill. 518; *Justice v. State*, 17 Ind. 56; *Reams v. State*, 23 Ind. 111; *State v. Bonney*, 34 Me. 223; *Ryan v. Com.*, 80 Va. 385; *Moultrop v. Bennett*, Kirby 351; *Robinson v. Mead*, 7 Mass. 353.

The question of jurisdiction, which is made here, arises upon the very face of the record and is for consideration under the motion in arrest. No. 115, Acts of 1904, puts justices of the peace and city and municipal courts on the same footing

in respect to their jurisdiction of offences against the provisions of the act. It provides in section 103 that they all shall have concurrent jurisdiction with the county court of offences of being found intoxicated, and in section 114 it provides that in all prosecutions under the act, "except for intoxication and where the respondent enters a plea of guilty," such courts may exercise the jurisdiction of courts of inquiry.

It was never meant that the City Court of St. Albans might in a given case proceed as a court of inquiry under section 114 above referred to, or, if it should choose, might proceed to try and determine the cause by virtue of the jurisdiction in criminal cases generally, given it by the charter of the city of St. Albans. The jurisdiction of justices in the administration of this law is determined without reference to their general jurisdiction in criminal cases, and, in like manner, the jurisdiction of city and municipal courts in the administration of this same law is fixed without reference to their respective charter powers.

We are confirmed in the conclusion above reached by reference to the liquor law of 1902. Section 98 of that Act provided that justices and city and municipal courts should have concurrent jurisdiction with the county court of offences thereunder. Section 114 of the existing law stands in lieu of section 98 of the former law, and a comparison of the two sections leaves no room for doubt that in the later enactment the legislative intent was to take away alike from justices of the peace and city and municipal courts, except when the plea should be guilty, the jurisdiction concurrent with the county court which they all had in a case like this under the Act of 1902. The construction of section 114 of the existing liquor law was considered in *Demarco's case*, 77 Vt. 445, 61

Atl. 36, and the conclusion here reached in the interpretation of the statute is in harmony with the decision in that case.

The judgment overruling the motion is reversed, the motion is sustained, judgment is arrested and the respondent is discharged.

J. S. VILES v. BARRE & MONTPELIER TRACTION & POWER CO.

October Term, 1903.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and HASELTON, JJ.

Opinion filed November 20, 1906.

Entire Contracts—Partial Performance—Right to Recover on Quantum Meruit—General Assumpsit—Evidence—Error Not Cured by Charge.

Where plaintiff has faithfully tried to perform exactly and completely his "entire" contract with defendant, but has been prevented from complete performance by causes not occasioned by him and which were beyond his control, and defendant has voluntarily received the benefit of plaintiff's faithful efforts to perform fully, plaintiff may recover *quantum meruit*, which is the value of the benefit so conferred on defendant, less his damage caused by plaintiff's failure of complete performance.

In such case, unless the party in default has in good faith endeavored to accomplish full performance, he deserves nothing.

In such case, plaintiff may recover *quantum meruit*, on a declaration in general assumpsit in the common counts. A technical *quantum meruit* count is not necessary to a recovery *quantum meruit*.

Lawrence v. Davey, 28 Vt. 264; *Eddy v. Clement*, 38 Vt. 486; *Kettle v. Harvey*, 21 Vt. 301; and *Dermott v. Jones*, 2 Wall. 1, distinguished and explained.

In general assumpsit to recover for electrical power furnished in July and August, 1899, it appeared that in June, 1897, by a valid written contract, for a stated consideration, plaintiff agreed with defendant to furnish it, from his plant operated by water power, a specified amount of electrical power daily for five years; that plaintiff performed and defendant paid till July 1, 1899; that in 1899, from August 19 to September 1, during some portions of each day but one, plaintiff failed to furnish the stipulated amount of power, and this resulted in such damage to defendant that it cancelled said contract on September 2, 1899, after which plaintiff furnished no more power. Plaintiff's evidence tended to show that his failure to perform was not wilful, but that it resulted from a severe and unprecedented drought, while he was endeavoring in good faith to perform according to the exact terms of the contract. *Held*, that plaintiff was entitled to recover *quantum meruit*, which is the fair value of the power furnished and not paid for, less defendant's damage caused by plaintiff's failure of complete performance, but in no event more than the contract price.

It appearing that plaintiff had other patrons besides defendant, it was proper to receive his evidence tending to show that, in his endeavors to supply defendant, he gave it a preference over his other patrons, and that an auxiliary steam power could not have been installed in time to relieve the situation.

It was error to exclude defendant's offered evidence, that in consequence of plaintiff's failure to furnish power in accordance with the terms of the contract, it suffered a loss of patronage, and so of earnings, during September, 1899.

Where inadmissible and prejudicial evidence is received against objection and exception, under an offer to so connect it with other evidence as to make it admissible, and that connection is not made, the error is not cured by directing the jury to disregard the evidence.

GENERAL ASSUMPSIT for electrical power furnished. Pleas, the general issue, and declaration in offset. Trial by jury at the March Term, 1902, Washington County, *Start*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. Plaintiff brought two suits to recover for power furnished in July and August, respectively, which suits were tried together.

Richard A. Hoar and *Rufus Brown* for the defendant.

Where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. *Chit. Cont.* 10th Ed. 663; *Jervis v. Tomkinson*, 1 Hurls. & N. 208; *Jones v. U. S.*, 96 U. S. 24; 1 Am. & Eng. Enc. 2nd Ed. 588; *School District v. Dauchy*, 25 Conn. 530; *Dewey v. Union School Dist.*, 43 Mich. 480; *Trenton Public School v. Bennett*, 27 N. J. L. 513; *Eddy et al. v. Clement*, 38 Vt. 486; *Remy v. Olds*, 21, L. R. A. 645; *Dexter v. Norton*, 47 N. Y. 62.

Where time is the essence of the contract, there can be no recovery at law in case of failure to perform within the time specified. *Salter v. Emerson*, 19 How. 224; *Davenport v. Wheeler*, 7 Cow. 231.

Plaintiff's agreement is entire. He must furnish power for each and every day before he is entitled to recover. *Lawrence v. Dole*, 11 Vt. 555; *Faulkner v. Hebard*, 26 Vt. 542; *Kettle v. Harvey*, 21 Vt. 301; *Scofield v. Grow*, 63 Vt. 283; *Brandon Mfg. Co. v. Morse*, 48 Vt. 322.

J. P. Lamson for the plaintiff.

HASELTON, J. In June, 1897, the plaintiff and the defendant entered into a written contract by the terms of which the plaintiff agreed to furnish, every day in the year for a period of five years, electrical power to the defendant sufficient for the operation of its electric railway between Montpelier and Barre, and the defendant agreed to pay for such power at a price named, in monthly installments.

The contract provided that the plaintiff should not be responsible to the defendant for damage resulting to it "from

interruptions to its traffic on its electric railways caused by fire, flood, tempest, riots, or a public enemy."

It appeared that in 1899, from August 19 to September 1, inclusive, the plaintiff during some portions of each day but one, failed to furnish the amount of power which under his contract he was bound to furnish, and it further appeared that during said days the defendant availed itself of power furnished, for the purpose of operating its road when it could, but that in consequence of shortage of power the operation of the road was from time to time necessarily suspended, and the defendant's cars were at a standstill.

September first the defendant sent the plaintiff a written notice stating that on account of the plaintiff's breach of the contract in failing to furnish the power therein provided for, the defendant, after the delivery of the notice, would treat the contract as ended and would neither take, accept nor pay for any more power under the contract. It appeared that this notice was received by the plaintiff in the morning of September second, and that thereafter no power was taken by the defendant from the plaintiff.

All the power taken by the company up to July 1, 1899, had been paid for, and in this case, which is a consolidation of two suits, recovery was sought for the power furnished on and after that date.

The plaintiff had fallen short of compliance with the contract. He could, therefore, recover, if at all, only upon such a showing as would entitle him to recover *quantum meruit*. The plaintiff, subject to objection and exception, introduced evidence tending to show that his failure to fulfil the contract was not wilful, but that it resulted while he was endeavoring in entire good faith to perform according to the exact terms of the contract. His plant was operated by water power, and

some of the evidence objected to tended to show that his failure was the result of an extraordinary and unforeseen drouth. It appeared that he had other patrons besides the defendant, and some of the evidence objected to tended to show that the wants of these patrons were not allowed to hinder him in his endeavors to supply the defendant; in other words, that he gave the defendant a preference over his other patrons. Some of the evidence objected to was to the point that after the shortage occurred or became imminent an auxiliary steam power could not have been established in time to relieve the situation. All this evidence was rightly admitted. Though the plaintiff had broken his contract, he had furnished power which the defendant had taken and used. In the nature of things there could be no rescission.

In the circumstances of the case, if the plaintiff could satisfy the jury that he had endeavored in entire good faith to fulfil the contract to the letter, then he was entitled to a *quantum meruit* recovery unless the amount of damage resulting to the defendant from the breach of contract was such as to prevent such recovery.

The common law rule which sometimes worked hardships undeserved and unsalutary has been somewhat relaxed, but good faith in endeavoring to perform fully and exactly is essential to a *quantum meruit* recovery in a case like this. In such a case, unless the party in default has in good faith endeavored to accomplish full performance he deserves nothing. To hold otherwise would be to encourage a disregard of contract obligations; while so to hold is to enforce the law of contracts as rightly understood, for of this law there is no better definition than that of Sir Frederick Pollock, who says: "The law of contract may be described as the endeavor of the state, a more or less imperfect one, by the nature of the

case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right mindedness." Williston's *Wald's Pollock on Contracts*, 1.

The evolution and establishment in this State of the rule which now obtains here in a case such as the plaintiff's evidence tended to make, may be sufficiently traced through the following cases: *Dyer v. Jones*, 8 Vt. 205; *Gilman v. Hall*, 11 Vt. 510; *Fenton v. Clark*, 11 Vt. 557; *Ripley v. Chapman*, 13 Vt. 268; *Barker v. Troy and Boston R. R. Co.*, 27 Vt. 780; *Brackett v. Morse*, 23 Vt. 557; *Hubbard v. Belden*, 27 Vt. 645; *Swift v. Harriman*, 30 Vt. 608; *Bragg v. Bradford*, 33 Vt. 38; *Eddy v. Clement*, 38 Vt. 486.

Some of the cases cited above speak of substantial performance as an element of recovery; but as is pointed out in *Drew v. Goodhue*, 74 Vt. 437, 52 Atl. 971, the phrase "substantial performance" is used in two senses. That it has a double and so a confusing use is made altogether clear by the opinion in *Manning v. School District*, 124 Wis. 84, 102 N. W. 356. In some of the cases it means full performance according to the fair intent of the contract, and permits recovery on the contract without recoupment. But as used in the cases relevant to the question here, it means something distinctly short of full performance, as the facts of the cases show, and includes such performance as was in this case shown to have been rendered down to the time when the defendant elected to treat the contract as at an end.

Counsel for the defendant cite *Lawrence v. Davey*, 28 Vt. 264, as a case analogous to this. There the plaintiff contracted to deliver certain quantities of hard wood coal to the defendant, but failed to deliver the quantities he had agreed to. The plaintiff recovered on the ground of a waiver by the

defendant, and in the opinion it is said that probably recovery could not have been had if the defendant had insisted upon strict performance of the contract. But that case states the things which the evidence of the plaintiff therein tended to show, and it did not tend to show that the plaintiff endeavored in good faith to comply with the terms of the contract.

Eddy v. Clement, 38 Vt. 486, is cited by the defendant as a case favorable to its contention. The plaintiff therein failed to furnish the defendants with the quantity of lumber which he had contracted to furnish them, and it was held that, though he was prevented from fulfilling on account of a severe drouth which stopped the lumber mills on which he was dependent, nevertheless, he broke his contract. But the effect given to the plaintiff's breach of contract was simply to permit the defendant to recoup his damages, and judgment went for the defendant solely because the damages recouped by the defendant equalled the sum to which at the contract price the lumber delivered and unpaid for would come.

Kettle v. Harvey, 21 Vt. 301, cited on the defendant's brief, is a case in which it was held that there was nothing due on an entire contract which had not been fully performed, but in that case there had been a voluntary and wilful abandonment of the contract. The defendant cites *Jones v. United States*, 96 U. S. 24. That was a case of a contract for furnishing an army in the field, and it was held that time was of the essence of the contract and that the government had a right to refuse to accept and pay for material tendered out of time. Had the government taken and used material furnished out of time and then refused to pay for it because it was not furnished in accordance with the contract a different case would have been presented.

Dermott v. Jones, 2 Wall. 1, a case which arose in the District of Columbia, is analogous to this. That was a case of a failure to perform all the undertakings of an entire contract. The court held that though the failure was in consequence of great and unforeseen difficulties the plaintiff below was not excused from doing what he had undertaken to do; but the Court were of opinion that he was entitled to recover subject to the defendant's right to recoup, a right which had been denied in the trial court. The Court further expresses itself upon several questions not necessary to the decision but likely to arise on a new trial of that case. What is thus said is in harmony with the doctrines which the Court of this State has from time to time applied. The Court say that recovery cannot be had by one who has wilfully left a contract unfinished; that good faith is essential to recovery by one who has not fully performed; that the suit in case of incomplete performance should be not on the special contract but on the common counts in *indebitatus assumpsit*, but that nevertheless the contract should be produced on trial. Finally the Court say: "There is great conflict and confusion in the authorities upon this subject. The propositions we have laid down are reasonable and just and they are entertained by a preponderance of the best considered adjudications." A lengthy note to *Hayward v. Leonard*, 19 Am. Dec. 272, recognizes the conflict and confusion of authorities, many of which are reviewed, but in closing the note Mr. Freeman says: "This doctrine seems to be recognized and to be growing in favor,—where under a special contract a party has in good faith bestowed some labor or parted with some articles to the benefit of another who has as a matter of fact enjoyed the benefit of the labor or the articles whether voluntarily or involuntarily and where the incomplete performance has not been the result

of the party's own provoking or of causes which he might with ordinary diligence have provided against, the one receiving the benefit must pay therefor." What is said in the above quotation about liability in case of the involuntary enjoyment of a benefit is a matter to be considered when occasion for its consideration arises; but here the matter of the involuntary enjoyment of a benefit is not involved. The defendant voluntarily took and used the power for which the plaintiff seeks to recover pay.

It may be remarked in passing that with a careful classification of the American cases having to do with contracts not fully performed, and by observing in each case the nature of the action brought, there is seen to be less conflict and confusion than is sometimes said to exist. However, we address ourselves only to the case at bar.

At the close of the evidence the defendant moved to have a verdict directed in its favor because the plaintiff had broken his contract; because the action was general assumpsit; and it being general assumpsit there could be no recovery by the plaintiff without a showing of full performance on his part; because in order to recover the plaintiff should have brought a special action on the contract; and because there was no evidence tending to show that any unforeseen thing came up to interfere with the fulfilment of the contract. The motion was overruled and the defendant excepted. The action of the court in denying the motion was right. The main question raised by the motion has already been considered. So, too, the tendency of the plaintiff's evidence has been sufficiently pointed out. As to the form of the action, general assumpsit in the common counts was appropriate in the circumstances which the plaintiff's evidence tended to show.

In argument in this Court counsel for the defendant treat the case largely as if it were an action on the special contract. They point to the facts that the contract was introduced in evidence by the plaintiff and that the plaintiff introduced evidence tending to show the reasons why the contract was not fully complied with. But in order to a *quantum meruit* recovery the contract and these reasons were needed in the case. In no state of the evidence could the plaintiff deserve to recover more than the contract price for power furnished, and he was bound to show why he had not fully performed according to the terms of the contract in order that the question of his good faith in endeavoring fully to perform might be determined.

Fully to meet the objection to the form of the action it should be said that a technical *quantum meruit* count is not necessary to a recovery *quantum meruit*. Such a recovery may be had under the common counts in *indebitatus assumpsit*. 1 Chit. Pl. 337; 2 Saunders, William's Ed. 122 a, n. 2.

The case was tried upon the correct theory that since the plaintiff in any view of the evidence had broken his contract, the defendant was entitled to recoup its damages resulting from the plaintiff's breach. In connection with its evidence on the question of such damages the defendant made an offer which, in substance, was an offer to show that in consequence of the failure of the plaintiff to furnish power according to the contract during the period from August 11 to September 1 inclusive, it suffered a loss of patronage and so of earnings during the month of September. Evidence under the offer was excluded, and we think that its exclusion was substantial error. The damage offered to be shown was such as might naturally result from the cause to which the defendant would attribute it and the defendant was entitled if it could to intro-

duce evidence which came up to its offer. The defendant had a right to the same latitude in showing its damages for the purpose of recoupment that it would have had in an action to recover damages for a breach of the contract, note to *Van Epps v. Harrison*, 40 Am. Dec. 314, and this being so, the evidence offered as above stated should have been received.

Certain evidence received subject to objection and exception by the defendant was admitted apparently with the expectation that other evidence, relative to the same matter, but not forthcoming, would be introduced. The exceptions show that the evidence in question was continuously presented to the jury in argument by both the junior and the senior counsel for the plaintiff. In the charge the court undertook to withdraw the evidence from the consideration of the jury. From a comparison of the evidence with the language of the presiding judge, we find that he stated its tendency fully and fairly, and we quote from the charge, as showing the nature of the evidence in question and the action of the court in reference thereto, the following paragraph:

"Evidence has been introduced tending to show that at the time it is claimed that the plaintiff failed to perform his contract, the defendant was under contract with the Consolidated Lighting Co. not to take power from the Viles plant while the plaintiff furnished lights in Montpelier, Middlesex and Barre; that a suit had been begun against the defendant to compel the performance of this contract in this respect; that the defendant was enjoined from taking power from the plaintiff; that this injunction was dissolved on the giving of a bond. This evidence was admitted for the purpose of showing that the defendant could not use the plaintiff's power without incurring expense or liability to the Consolidated Lighting

Co., and that the defendant derived a benefit or advantage from the termination of the contract between the plaintiff and the defendant, that ought to be considered in determining what damages ought to be charged to the plaintiff by reason of the breach of contract; but this evidence has not gone far enough to show wherein the defendant in these respects was benefited by a termination of the plaintiff's contract, nor to furnish a basis for computing such benefit, if any, and for this reason this evidence relating to the defendant's contract with the Consolidated Lighting Co., the said injunction order dissolving it, and the bond, are withdrawn from your consideration and you will not consider this evidence for any purpose, and will decide the case as you would have done if this evidence had not been admitted."

The trial court was clearly right in ruling that this evidence, as it was left, was improperly in the case. This being so, and the evidence being in its nature prejudicial, it is not probable that it was rendered innocuous by the attempt to withdraw it from the consideration of the jury. They must already have considered it in connection with the legitimate evidence before them, and notwithstanding all that the court well and forcibly said, the withdrawal of the improper evidence from the consideration of the jury was probably nominal rather than actual, and so cannot be held to have had a curative effect.

The defendant took exceptions to rulings upon evidence made during the examination of one Andrews, a witness called by the plaintiff, but there is no sufficient reason for considering these. Exceptions were taken to the charge but they were waived in argument.

Judgment reversed and cause remanded.

IN RE BURRILL LANE'S ESTATE.

October Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, and POWERS, JJ.

Opinion filed November 20, 1906.

*Executors and Administrators—Compensation for Services—
Failure Seasonably to File Account—Effect—Husband
and Wife—Conveyance by Executor to Wife—Allowance
of Executor's Account.*

The failure of an executor to comply with the statutory requirements that he shall file his account within one year from receiving his letters testamentary, etc., should be considered in determining whether any, and if so, how much compensation shall be allowed him for his services; but such failure does not, in itself, operate as a bar to all compensation.

Where an executor agreed with his wife, who was a residuary legatee under the will, that she should take in payment of her legacy a certain house and lot, the property of the estate but occupied by the executor and his family, and in fulfillment of that agreement he conveyed the property to his wife's sister, who was to deed it to his wife, but did not do so till about eleven years thereafter when she also filed her deed for record, and during those years the estate incurred no expense in respect of the property, the executor was properly charged with the rental thereof only to the date of the conveyance to his wife's sister, no claim being made that it was not advantageous to the estate to thus pay the wife's legacy.

Since the report of the commissioner herein negatives those acts of delay and negligence which subject the executor to be charged as for waste of the estate, that matter is not considered.

APPEAL from a decree of the probate court allowing the account of Horace L. Moore, as executor of the will of Burrill Lane, presented by Fred Johonnott, as administrator of the estate of said Horace L. Moore; Edward B. Lane, Effie

C. Aiky, William Lane, and Fred C. Lane, legatees under the will of Burrill Lane, appellants. Heard on the report of a commissioner and appellants' exceptions thereto, at the March Term, 1905, Chittenden County, *Watson, J.*, presiding. Judgment overruling the exceptions, and allowing the account as found by the commissioner. The appellants excepted.

A. V. Spaulding, R. E. Brown, and Cowles & Moulton for the appellants.

An executor should not be paid for his services where he pays no attention to the statutory requirements as to the filing of his account. *Foster's Executrix v. Stone, Admr. et al.*, 67 Vt. 336; *Spaulding v. Wakefield's Estate*, 53 Vt. 660; *Re Hodges' Est.*, 66 Vt. 70; *Woods, Admr. v. Creditors*, 4 Vt. 256.

Elihu B. Taft and Edmund C. Mower for the administrator of Horace L. Moore's estate.

HASELTON, J. This was an appeal from the allowance by the probate court of the account of Horace L. Moore, as executor of the will of Burrill Lane, presented by the administrator of said Moore's estate. The case was heard by the county court on the report of a commissioner, and judgment was rendered allowing the account as allowed and reported by the commissioner. The appellants excepted.

Item 61 of the account is a credit of \$500 to the executor for services. It appeared that Burrill Lane died February 24, 1877, leaving an estate worth some \$12,000. This was disposed of by a will in which Horace L. Moore was named as executor. Moore qualified and acted as such until his death, January 31, 1901. The will provided that a certain portion

of the estate should remain in the hands of the executor during the lifetime of a legatee who in fact survived the executor. The executor made various settlements with legatees, but died without closing the estate. The commissioner reports in considerable detail what the executor did towards the settlement of the estate, and reports his findings with regard to services and his allowance therefor as follows: "Taking into consideration what was done by said Horace L. Moore as executor of said estate under Burrill Lane's will, I find that his duties were faithfully performed, except so far as he failed to render his account and have the same settled in his lifetime, and as the evidence shows that his services were worth \$500 to the estate, item 61 is allowed as charged at the sum of \$500."

The first question before this Court is simply whether as matter of law, this item should have been disallowed in the judgment rendered by the county court.

The statutes of this State provide that every executor shall render an account within one year from the time of receiving his letters testamentary unless the probate court extends this time and that he shall render further accounts as required by the court until the estate is settled; that the probate court shall examine every executor upon oath as to the correctness of his account before the same is allowed, except when no objection is made to the account, and its correctness is established by competent testimony. The filing of an account within the time provided by statute is wisely required, and in determining whether compensation shall be allowed an executor, and if compensation is allowed, in determining the amount of the compensation, failure to file an account as the law directs is an important circumstance to be considered in connection with other facts that have a bearing upon the question of what the just deserts of the executor are; but we

do not think that failure to file the account as the law directs shuts out consideration of the general fidelity and efficiency of the executor, and the importance, value and amount of his services, and operates in itself as a bar to all compensation.

In some states it is provided by statute that an executor who fails to file the accounts provided for shall receive no compensation, and other states formerly had such a statute which has been repealed. Decisions under such a statute are obviously of no assistance here. But the policy of our Legislature has been to stop short of any such arbitrary rule. The principles which have governed our Court in the matter of compensation are in a general way shown by the cases which have been cited in the briefs of counsel. The cases decided by this Court cited on the one side or the other, are as follows: *Hapgood v. Jennison*, 2 Vt. 294; *Foster's Executrix v. Stone*, 67 Vt. 336, 31 Atl. 841; *Spaulding v. Wakefield's Estate*, 53 Vt. 660; *In Re Hodge's Estate*, 66 Vt. 70, 28 Atl. 663; *Woods v. Creditors*, 4 Vt. 256.

No one of these cases is inconsistent with the view taken here and some of them support it. It is strongly supported by *Hapgood v. Jennison*, 2 Vt. 294, a case which commended itself to the Massachusetts Court when that Court had to do with the same matter that had been before our Court. *Jennison v. Hapgood*, 10 Pick. 77.

The principles which in this jurisdiction determine the allowance and the denial of compensation to administrators and executors have been recently considered and applied in *Walworth's Est. v. Bartholomew's Est.*, 76 Vt. 1, 56 Atl. 101, and it accords with the opinion and the decision therein to treat the allowance of compensation in the case at bar as proper under the findings of the commissioner.

Instructive cases decided in other jurisdictions are the following: *Birkholm v. Wordell*, 7 Atl. 569; *Bendall v. Bendall*, 60 Am. Dec. 469; *Craig v. McGee*, 16 Ala. 41; *Gould v. Hayes*, 19 Ala. 438; *In re Barcalow*, 29 N. J. Eq. 282.

A part of Burrill Lane's estate was a city house and lot. At the time of said Lane's death, Horace L. Moore with his wife, daughter and his wife's sister, Mary C. Lane, resided upon said place. Moore's wife, Maria E. Moore, was one of the residuary legatees under the will of Burrill Lane and in January, 1880, it was agreed that she should take the place in satisfaction and payment of her residuary legacy and as Horace L. Moore could not deed directly to his wife, the arrangement was carried out by his deeding to his wife's sister, Mary C. Lane. The deed was delivered at the time of its execution, but was not left for record until shortly after the death of Horace L. Moore, when it was put upon record. At about the time it was left for record, Mary C. Lane deeded the place to Maria E. Moore. The Moores had continued to occupy the place down to the death of Horace L. Moore. The commissioner charged the executor with the rental value of the place down to January 19, 1880, the time when Moore as executor deeded it to Mary C. Lane. The appellants claim that the executor should have been charged with the rental value of the place down to his death. They point out that the taxes on the place were assessed to Burrill Lane's estate and that receipts for their payment ran to the estate. But the commissioner finds that in fact the taxes were not paid by the estate, but were paid by Horace L. Moore or his daughter. The commissioner also finds that sewer assessments were paid by the daughter, and that such repairs as were made after January 19, 1880, were paid for by Horace L. Moore, his wife or daughter. There is nothing in the report nor in any

claim made in the brief of appellants' counsel to suggest that it was not advantageous to the estate to have the claim of Maria E. Moore as residuary legatee extinguished by the deed of the place, and there is no suggestion that the commissioner did not properly scrutinize the transaction between the executor and his wife. The mere fact that the deed was not recorded until 1901, did not prevent it from becoming operative at the date of its execution and delivery, and the case shows no error in respect to the allowance or the disallowance in the matter of the rent of the city house and lot.

The appellants claimed before the commissioner that the estate of the executor should in the accounting be charged with waste under V. S. 2412, and that claim is urged here as one that arises on the report and the judgment thereon. The section in question reads as follows: "When an administrator neglects or unreasonably delays to raise money by collecting the debts or selling the real or personal estate of the deceased, or neglects to pay over the money he has in his hands, and the value of the estate is thereby lessened, or unnecessary cost or interest accrues, or the persons interested suffer loss, the same shall be deemed waste, and the damages sustained may be charged and allowed against him, in his account, or he shall be liable therefor on his bond." With respect to this claim as made here it is enough to say that the report negatives the things which are essential to the sustaining of charges for waste under the statute invoked.

The remaining questions argued in this Court relate to the effect to be given to a certain paper signed by Edward B. Lane, one of the appellants, purporting to be a receipt and a release given to the administrator of Horace L. Moore's estate. But the conclusions reached on the questions already

considered make questions as to the effect of this instrument wholly immaterial.

Judgment is affirmed and is to be certified to the Probate Court.

TOWN OF JERICHO v. TOWN OF HUNTINGTON.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed November 22, 1906.

*Towns—Support of Paupers—Residence—Evidence—Inten-
tion—Declaration of Pauper—Res Gestae—Offer of Evi-
dence—Not Sufficiently Specific.*

In an action by one town against another to recover for expenditures in the support of a pauper, where plaintiff's evidence tended to show that the pauper with his family moved into the defendant town at a certain time, and that, in arranging for that removal, the pauper went there in advance to engage board with plaintiff's witness, it was proper to allow that witness to testify to declarations of the pauper, connected with the transaction of engaging board, evincing an intention to abandon his former residence and to reside thereafter in the defendant town.

It appearing that after the pauper had moved into the defendant town, he and his family were for a time at the home of H. in a third town, and that the character of that stay was in issue, plaintiff's evidence tending to show that it was temporary, and defendant's evidence tending to show the contrary, but the pauper not having testified, defendant's offered evidence that after the pauper returned to the defendant town, and before he went to the

plaintiff town, he said that he could not get along with H. and therefore threw up his contract under which he had gone to H.'s "to reside," was properly excluded.

Defendant's offered evidence that, shortly before the pauper went to H's, he was told that H. "wanted a man to go onto his place to stay for a year to cut lumber or wood at the halves and draw it away, and live with the old man and take care of him," had no tendency to show what the arrangement between the pauper and H. actually was, and was properly excluded.

Since the evidence on each side tended to show that the pauper was at H's, and was at work there, defendant's offer to show merely what the pauper was doing there two or three days after he was told that H. needed a man, was properly excluded as immaterial.

If defendant desired to show that the pauper was doing work at H's which substantiated defendant's claim as to the arrangement under which he was there, the offer should have been specific enough to make the relevancy of the offered evidence apparent to the Court.

ASSUMPSIT, under V. S. 3171, to recover for expenditures for the support of a pauper. Plea, the general issue. Trial by jury at the March Term, 1906, Chittenden County, *Miles, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The testimony of LaFlash, referred to in the opinion, was as follows:

"Q. When he came up there and this board was engaged;—if he said anything about his purpose in coming there,—whether it was for a permanent stay or for visiting,—what did he say the purpose was, if anything?

A. He said he didn't want to stay there because he wasn't getting big enough wages so he come to Huntington and hired out to George Baker. Then he stopped and hired his board there to my place.

Q. Did they go back to Williston to live and reside?

A. No, sir."

V. A. Bullard for the defendant.

Defendant's offered evidence as to what the pauper told O'Brien about why he left Harvey's, should have been admitted. *Derby v. Salem*, 30 Vt. 722.

L. F. Wilbur and *C. S. Palmer* for the plaintiff.

It is well settled that the declarations of a person when made accompanying the act and in connection with the act which becomes a controverted matter on trial of a case, may be proved as a part of the *res gestae*. 1 Greenl. Ev., §108; *Elkins v. Hamilton*, 20 Vt. 627; *Thorndike v. City of Boston*, 1 Met. 249; *Etna v. Brewer*, 78 Me. 377.

What a pauper says after he has come to reside in a town, or after he has left one town and gone to live in another, cannot be admitted as a part of *res gestae*, because the declarations have reference to acts already transpired and could not add force or give character to a transaction which was before complete. *Salem v. Inhabitants of Lynn*, 13 Met. 544; *Corinth v. Lincoln*, 34 Me. 310; *Noyes v. Ward*, 19 Conn. 250; *Law v. Fairfield*, 46 Vt. 425; *Davis v. Fuller*, 12 Vt. 178; *Elkins v. Hamilton*, 20 Vt. 627; *St. Johnsbury v. Waterford*, 15 Vt. 692.

HASELTON, J. This was an action under the statute to recover for expenditures in the support of one George LaTulippe, a pauper. Trial by jury was had, and the verdict and judgment were for the plaintiff. It was conceded that the verdict and judgment were right provided the requisite three years' continuous residence of LaTulippe had been in the defendant town. The exceptions taken and relied on were to the admission and rejection of evidence. The evidence on the

part of the plaintiff tended to show that LaTulippe with his family removed from Williston to Huntington in the fall of 1897, and that in arranging for the removal LaTulippe went beforehand to the house of John LaFlash in Huntington and engaged board. Under objection and exception LaFlash was allowed to testify to declarations of LaTulippe, connected with the transaction of arranging for board, evincing an intention to reside in Huntington and no longer in Williston. These declarations of LaTulippe must be considered to have accompanied the act of removing, and as they characterized the act they were admissible.

It appeared that after LaTulippe removed to Huntington, he and his wife and children were for a time at the home of one Harvey in Hinesburgh. The evidence on the part of the plaintiff tended to show that the time was about one week, and that they were there temporarily helping Harvey, during a sickness, to do chores and other work, with the intention of returning as they did to Huntington.

The evidence on the part of the defendant tended to show that LaTulippe was in Hinesburgh about two weeks, that he went there to reside, and was residing there under an agreement by which he was to carry on Harvey's farm for a year, board and care for Harvey, who was an old man, and cut and draw wood on shares from the farm to the market. The character of LaTulippe's stay in Hinesburgh being in dispute, the defendant offered to show that at some time after he had gone back to Huntington and before he went to the plaintiff town, LaTulippe told one O'Brien that he left Harvey's because of a misunderstanding; "that he couldn't get along with the old man and therefore threw up the contract under which he had gone to Harvey's to reside." Evidence under the offer was excluded, and its exclusion was proper. The offered

evidence accompanied and characterized no act, and was in no sense any part of any *res gestae*. It was not receivable under the rule relating to the admissions of parties, for LaTulippe was not a party. It was not admissible as impeaching evidence, for LaTulippe was not a witness, and if he had been, a foundation must have been laid for such evidence.

The defendant called one Michael Bradley and offered to show by him that a day or two before LaTulippe went to Harvey's, Bradley called his attention to the fact that Harvey "wanted a man to go onto his place to stay for a year to cut lumber or wood at the halves and draw it away and live with the old man and take care of him." This evidence, as the court held, was inadmissible. It was no evidence tending to show what the arrangement between LaTulippe and Harvey actually was. A party's claim as to what a contract was cannot be supported by such evidence. The offered evidence did not tend to show why LaTulippe went to Harvey's, since for anything that appears, the conversation may well have been had after Bradley was informed that LaTulippe was going to Harvey's for some purpose. There was a further offer to show that two or three days after this conversation Bradley saw LaTulippe at Harvey's and, in the language of the offer, "to show what he saw LaTulippe doing there," meaning, of course, at that time. The evidence thus further offered was excluded, and in its exclusion there was no error. It would have been immaterial to show that Bradley saw LaTulippe at Harvey's, for the evidence on both sides tended to show that he was there, and it would have been immaterial to show that Bradley saw LaTulippe doing something while there, since the evidence on both sides tended to show that he was there at work. If the defendant desired to show that his witness saw LaTulippe doing work at Harvey's that made in

favor of the defendant's claim as to the arrangement under which LaTulippe was there, the offer should have been specific enough to make the relevancy of the offered evidence apparent to the court.

Judgment affirmed.

CHARLES SEARS v. MARTIN DULING.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
POWERS, JJ.

Opinion filed November 22, 1906.

Slander—Improper Argument—Reversible Error—Instruction—Exception on Ground Not Justified by Record.

In an action for slander, where the defence was that defendant, in good faith and without malice, made the statement complained of as having been told him by another person whom he then named, plaintiff's exception to the court's charge as to malice only on a ground which assumed that defendant had admitted that he did not believe the words spoken, will not be considered, if the record does not show such admission to have been made by defendant.

It was reversible error to allow defendant's counsel, against plaintiff's objection, to persist in arguing that the jury should draw an inference unfavorable to plaintiff from his failure to call as a witness a person who was equally accessible to either party.

The trial court may so deal with the improper argument of counsel that no exception will lie, and the only remedy of the defeated party be an application to that court for a new trial, if he still feels that such argument was a factor in his defeat.

CASE for slander. Plea, the general issue. Trial by jury at the December Term, 1905, Windsor County, *Miles*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted. In respect of the improper argument of defendant's counsel, the exceptions state only that: "Neither side improved Woodruff as a witness but it appeared during the trial that he lived within a few miles of the parties and that either side might have secured his attendance had they seen fit. Mr. G. A. Davis, attorney for defendant, stated in argument to the jury, 'Why is not Woodruff here?' When an objection was interposed by Mr. Buck.

Mr. Davis.—'We say they ought to have had Woodruff here as a witness.'

Mr. Buck.—'We desire an exception.'

The Court.—'Note an exception.' "

J. C. Enright and *E. R. Buck* for the plaintiff.

Davis & Davis for the defendant.

HASELTON, J. This was an action on the case for slander. A verdict was returned for the defendant and judgment was rendered thereon. The plaintiff excepted. Of the exceptions taken by the plaintiff only two are relied on. To the charge of the court as to malice the plaintiff excepted, but only on a ground which assumed that the defendant had admitted that he did not believe the words spoken. But it does not appear that he had made such an admission. It does appear from the exceptions that he testified that he had no knowledge of the matter and that he was told the story by one Woodruff, but it nowhere appears that he admitted that he did not believe the story. The exception to the charge was taken solely upon an untenable ground, and, therefore, though

questions outside of the designated ground have been argued, they have not been considered by the Court.

In argument counsel for the defendant animadverted vigorously upon the failure of the plaintiff to call as a witness the Woodruff above mentioned. Counsel persisted in so doing after objection was made. An exception was taken and allowed and the matter was there left. The exceptions show that Woodruff lived within a few miles of the parties and was equally accessible to both. If Woodruff had told the defendant the story in question the defendant must have known the fact as well, at least, as the plaintiff; and so it would be absurd to apply the rule in the *McCabe Will Case*, 73 Vt. 175, 50 Atl. 804, and say that the testimony that Woodruff could give may have been peculiarly within the knowledge of the plaintiff. It did not lie in the defendant's mouth to ask the jury to draw conclusions unfavorable to the plaintiff from the plaintiff's failure to call Woodruff as a witness.

The error in the argument was palpable and prejudicial. *State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108.

This Court has endeavored to make clear the impropriety and injustice of the argument indulged in in this case, and the trial court was, perhaps, wise in giving the plaintiff an exception which is available, although the matter might have been so dealt with that no exception would lie, and the plaintiff, if he still felt that the viciousness of the argument was a factor in his defeat, would have had no other remedy than an application for a new trial. *Smith Woolen Co. v. Holden*, 73 Vt. 396, 51 Atl. 2; *Lockwood v. Fletcher*, 74 Vt. 72, 52 Atl. 119; *State v. Young*, 74 Vt. 478, 52 Atl. 1047; *Kilpatrick v. Grand Trunk Ry. Co.*, 74 Vt. 288, 52 Atl. 531; *Billings v. Ins. Co.*, 70 Vt. 478, 41 Atl. 516.

In respect to the error in argument this case stands as stood *Montpelier & Wells River R. R. Co. v. Macchi*, 74 Vt. 403, 52 Atl. 960; *Blaisdell & Barron v. Davis*, 72 Vt. 295, 48 Atl. 14; *Wood v. Agostines*, 72 Vt. 51, 47 Atl. 108; *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370, 45 Atl. 755; *Ranchou v. Rutland R. R. Co.*, 71 Vt. 142, 43 Atl. 11; *Cutler v. Skeels*, 69 Vt. 154, 37 Atl. 228; *State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429; and *Magoon v. Boston & Maine R. Co.*, 67 Vt. 177, 31 Atl. 156.

The doctrine of the cases cited is once more affirmed.

Judgment reversed and cause remanded.

IDA F. KITTREDGE, BY HER NEXT FRIEND, ET AL. v. ALBERT K. KITTREDGE.

October Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed November 22, 1906.

Equity—Specific Performance—Husband and Wife—Statute of Frauds.

In a suit in equity for specific performance, brought by a wife and her children by a former husband against her present husband, the bill alleged that, after her marriage with defendant, the wife was indebted to her said children and had nothing wherewith to pay them except a certain farm, which she owned in her own right and in which defendant was claiming an interest by virtue of his marital relation; that an agreement was thereupon entered into between the complainants and defendant by which a portion of

that farm was to be conveyed to defendant and by which, in return, he was to join with his wife in deeding the remainder of the farm to her said children; that the part of said agreement which was for defendant's benefit had been fulfilled, but that he refused to perform his part; and that said children are in possession of that part of the farm which defendant was to join in deeding to them. *Held*, on demurrer to the bill, that the contract alleged is peculiarly one for cognizance and enforcement in a court of equity, which in such case is not at all embarrassed by the marital relation.

By the alleged performance and possession the agreement is taken out of the Statute of Frauds.

The unconstitutionality of No. 49, Acts 1896, as amended by No. 55, Acts 1898, is irrelevant to the case stated in the bill. *Hubbard v. Hubbard*, 77 Vt. 73, distinguished.

APPEAL IN CHANCERY. Heard on demurrer to the bill at the June Term, 1906, Orange County, *Tyler*, Chancellor. Demurrer sustained and bill dismissed. The orators appealed. The opinion states the material allegations of the bill.

R. M. Harvey for the orators.

Courts of equity will specifically enforce a contract made by a husband with his wife and others, which involves the wife's separate property. *Curtis v. Simpson*, 72 Vt. 232; *Pinney v. Fellows*, 15 Vt. 525; *Barron v. Barron*, 24 Vt. 375; *Frery v. Booth*, 37 Vt. 87; *Hubbard v. Bugbee*, 58 Vt. 172; *Richardson v. Morrill's Est.*, 32 Vt. 27; *Caldwell v. Renfrew*, 33 Vt. 213; *Willard v. Dow*, 54 Vt. 188; *Hackett v. Maxley*, 68 Vt. 210; *Drew v. Corliss*, 65 Vt. 650.

Darling & Wilson for the defendant.

A post nuptial agreement to be valid must be in writing and properly executed. 19 Cyc. 1247.

HASELTON, J. This bill as amended is a bill to compel specific performance. Ida F. Kittredge, by her next friend, and Rollin B. Prescott and Gertrude E. Prescott are complainants in the amended bill in this cause. The defendant answered the amended bill and incorporated a demurrer therein. The court of chancery rendered a decree sustaining the demurrer to the amended bill and dismissing the same. The complainants appealed. Among the facts set out in the bill as amended are the following: Albert K. Kittredge and Ida F. Kittredge are husband and wife. They were married in 1895. Rollin B. Prescott and Gertrude E. Prescott are children of Ida F. by a former husband, and are of legal age. At the time of the marriage of Ida F. and Albert K. the former owned in her own right a certain farm called the Prescott farm. In 1903 the said Ida F. was indebted to her children, Rollin B. Prescott and Gertrude E. Prescott, and had no property out of which to pay them except the farm. At the same time her husband, Albert K., was claiming an interest in the farm by virtue of the marital relation. Thereupon an agreement was entered into between the complainants and the defendant by which a portion of the farm was to be conveyed to the husband through a third person, and by which in return he was to join with his wife in deeding the remainder of the farm to his wife's children hereinbefore named. The part of the agreement which was for the benefit of the husband was carried out, but he, having got the benefit of the arrangement, refused to perform on his part. However, the said Rollin and Gertrude are in possession of the part of the farm to which the defendant's agreement in respect to a deed to them related. The marital relation does not embarrass a court of equity in a case such as the bill states. *Pinney v. Fellows*,

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15 Vt. 525; *Barron v. Barron*, 24 Vt. 375; *Frary v. Booth*, 37 Vt. 87; *Curtis v. Simpson*, 72 Vt. 232, 47 Atl. 829.

The contract here was peculiarly one for cognizance and enforcement in a court of equity. *Mann v. Mann's Est.*, 53 Vt. 48, 55.

The unconstitutionality of No. 49, Acts of 1896, as amended by No. 55, Acts of 1898, see *Hubbard v. Hubbard*, 77 Vt. 73, 58 Atl. 969, is irrelevant to the case stated in the amended bill. Here is no attempt to deprive the husband of his property without due process of law, but rather an attempt to prevent him from defrauding his wife and the other complainants. The case has the elements which make a decree for specific performance essentially a matter of course, though, to speak with exactitude, the granting of such a decree rests in the discretion of the court. *Fowler v. Sands*, 73 Vt. 236, 50 Atl. 1067.

The Statute of Frauds is suggested as an obstacle, but by such performance and possession as are set out in the bill the agreement is taken out of the Statute of Frauds. *Stark v. Wilder*, 36 Vt. 752; *Griffith v. Abbot*, 56 Vt. 356; *Holmes v. Caden*, 57 Vt. 111; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092.

The decree sustaining the demurrer to the amended bill and dismissing the same is reversed, the bill is adjudged sufficient and the cause is remanded.

CHARLES C. ELLIS'S ADMR. v. DANIEL DURKEE.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed November 26, 1906.

Contracts—Consideration—Variance—V. S. 1630—Offer Without Consideration—Effect—Offer Without Time Limitation—Effect—Reasonable Time—Question of Fact—Evidence—Damages—Lack of Special Allegation—Judgment—Manifest Error in Computation.

An offer, in order to be effectual as such, need not be supported by a consideration; such consideration would only affect the right of revocation.

An offer without a consideration may be revoked at any time, but, if seasonably accepted before it is revoked, it results in a binding contract.

Where an offer is not limited as to time, it remains open for a reasonable time, unless sooner accepted or revoked.

In assumpsit by an administrator, it appeared that on December 15, 1900, defendant voluntarily wrote plaintiff's intestate advising him to refrain from selling certain corporate stock that he was desirous to sell, and adding: "Now at any time after six months, if you still think you want to quit, I will cash you up myself, and pay you six per cent., if you can't do better." Thereafter the intestate continued to hold his stock, but it did not appear that he did so in reliance on said proposition, and on August 23, 1901, the offer not having been withdrawn, he wrote defendant that he would accept his offer and turn the stock over to him at six per cent., and thereupon defendant denied having made the offer and refused to take the stock. *Held*, that defendant's proposition was a continuing offer, without a consideration, and, therefore, open for six months and for a reasonable time thereafter, and that the acceptance thereof by the intestate within such reasonable time resulted in a contract binding defendant to fulfil his offer.

Defendant was not entitled to a formal tender of the stock, for he denied the offer and absolutely refused to take the stock.

The real consideration for defendant's agreement to take the stock was the intestate's agreement to turn it over to him on the terms named, and not his forbearance to sell in reliance upon defendant's proposition.

Although the declaration alleges that the consideration for defendant's agreement was the intestate's forbearance to sell the stock, yet, as enough appears in the declaration to show what the real consideration was, the objection that there was a variance between the proof and the declaration is technical merely.

Since the variance complained of does not "affect the right of the matter," and the exceptions do not show that any claim of variance was made or passed upon in the trial court, that question, because of V. S. 1630, cannot be considered by this Court.

The question of reasonable time is, ordinarily, one of fact, and as there is nothing in this case to take it out of the general rule, the finding of the trial court that the acceptance of the offer was within a reasonable time is conclusive.

Defendant's letter to the intestate, dated August 12, 1901, giving a favorable account of the business of the corporation that issued the stock in question, was properly received in evidence as bearing on the question of reasonable time, since it tended to explain the intestate's delay in accepting the offer.

Because the declaration contains no allegation of special damage, if for no other reason, it was error to allow plaintiff's judgment to include the amount of an assessment on the stock paid by the intestate; and there was also a manifest error in computation. But, as the record gives the figures necessary to correct these errors, judgment is reversed, and judgment entered for plaintiff for the correct amount.

GENERAL AND SPECIAL ASSUMPSIT. Plea, the general issue. Trial by court at the June Term, 1906, Windsor County, *Rowell*, J., presiding. Judgment for the plaintiff. The defendant excepted.

Among the findings of the court is the following: "The defendant never withdrew his offer, but left it open; and if it is a question of fact, we find that in the circumstances the intestate accepted the offer within a reasonable time, and that

he was influenced to some extent to delay acceptance by reason of defendant's letter of June 19th."

The body of the letter of Aug. 12, 1901, mentioned in the opinion is as follows: "Your last came duly on time. I waited a short time, thinking would finish well started when you was here. It is now 1300 feet, and I want to put it, if possible, 1400. It shows good, but the deeper we go the lighter the oil. The well on the hill, finished at 1200 feet, is good for 100 bbls. daily, and possibly more. Not pumping it now. Nearly $\frac{3}{4}$ wells here are shut down. Oil is without price at present time, and stocks are all low in sympathy. If the Combination materializes, prices will go up very soon. H—— Bartlett can give you conditions if you will write to them. It is a black eye at present but surely has a future."

Tarbell & Whitham and *Davis & Davis* for the defendant.

When the facts are found, the question of what is a reasonable time is one of law. *Loring v. Boston*, 5 Met. 409; 2 *Parsons Cont.*, 651-775; *Holbrook v. Burt*, 22 Pick. 546.

John J. Wilson and *W. B. C. Stickney* for the plaintiff.

Forbearance to sell the stock constituted a good consideration. *Ballard v. Burton*, 64 Vt. 387-393; *Stevens v. Gibson*, 69 Vt. 143; *Cit. Sav. Bank v. Babbitt Est.*, 71 Vt. 182; *In Re Stevens & Adams, Locklin, Receiver*, 74 Vt. 408; *Hakes v. Hotchkiss*, 23 Vt. 231.

POWERS, J. The intestate and defendant were stockholders and directors of the Minnehaha Oil Company, of California. The former lived in Massachusetts, and the latter, who was superintendent of the company, in California. In

December, 1900, the intestate was anxious to sell his stock, and so wrote the defendant, who replied on the 15th of that month expressing his surprise that the intestate should desire to sell, insisting that it would not be to his advantage to do so, and adding, among other things not here material: "Now at any time after six months, if you still think you want to quit, I will cash you up myself, and pay you six per cent., if you can't do better." This proposition was never withdrawn, but allowed to stand open until accepted as hereinafter stated. The trial court declined to find that the intestate relied upon this proposition, but did find that after this letter was received the stock advanced in price and the intestate came to think so well of it as an investment that he did not care to sell at all,—at least not at the price he could then get, as he expected it to go higher. Later on, the price of oil went down, oil stocks went down in consequence, and this particular stock became unsalable and worthless. On June 13, 1901, the intestate again desired to sell his stock, and on that day wrote the defendant to that effect. The defendant replied on the 19th, urging him to be patient, insisting that it was no time to sell, giving encouraging reports as to the affairs of the company, and assuring him that he had no cause for alarm. On August 12, 1901, the defendant wrote the intestate, another letter of similar import. On the 23rd of that month, the intestate wrote the defendant that he would accept his offer and turn over his stock to him at six per cent. To this letter the defendant replied on the 29th denying that he ever made such an offer and declining to take the stock. The defendant never has taken it, and it is now held by the intestate's estate. The suit is brought upon the offer and acceptance contained in the correspondence to recover the amount paid by the intestate for the stock with interest at six per cent., together with the

amount of two assessments paid on the stock,—one in August, 1901, and the other in June, 1902. The plaintiff had judgment in the court below for the sum paid for the stock and the amount of the last assessment, with interest on both sums. The defendant objected and excepted to the admission in evidence of the defendant's letter of December 15, 1900, on the grounds that it did not tend to support the declaration, and that the promise therein was without legal consideration.

The letter did not tend to sustain all the allegations of the declaration, but this is not necessary. It did tend to sustain some of the material allegations, and this is all that is required to make it admissible.

We agree with counsel for the defendant that, in view of the failure to find that the intestate forebore to sell the stock in reliance upon the defendant's proposition, the offer of December 15 was a mere proposition unsupported by a consideration. But it was an offer just the same, and an offer need not be supported by a consideration in order to serve its purpose as such. The only importance of inquiring whether or not an offer is supported by a consideration is to determine whether it can be withdrawn by the party making it before it is accepted by the party to whom it is made. If it is based upon a consideration, the power of revocation is not attached to it. But though it be without consideration, it may be accepted so as to make a binding contract if not sooner revoked; but it may be revoked at any time before it is accepted,—and this is so though it states a certain time during which it is to remain open. *B. & M. R. R. v. Bartlett*, 3 Cush. 224. It is the acceptance of such an offer, within the time and according to the terms specified, which completes the binding contract. *Cheney v. Cook*, 7 Wis. 413; *Wilcox v. Cline*, 70 Mich. 517. If no time is limited in the offer, it remains open a reasonable

time unless sooner withdrawn. *Stone v. Harmon*, 31 Minn. 512; *Lamson v. Jordan*, 56 Ill. 204.

The character of this proposition was such that it was a continuing offer,—good, if not withdrawn, for six months and for a reasonable time thereafter. *Dawley v. Potter*, 19 R. I. 372, is, in principle, much like this case. The defendant there sold the plaintiff the mare Empress in foal by Aristocrat, and at the same time gave him a writing as follows:

Providence, R. I., July 12, 1892.

John A. Dawley, Esq.,

Dear Sir: I will agree to give you two hundred and fifty dollars (\$250.) for a foal of 1893 by Aristocrat, out of Empress, provided such colt is a filly, all right and sound at five months old, well marked, with no white on front feet, should you wish to sell her.

Very truly,

EARL H. POTTER.

A filly which answered this description was born May 12, 1903. It was held that the plaintiff had a reasonable time after the foal became five months old within which to signify his acceptance of the defendant's proposition. In that case, to be sure, the offer was based upon a valid consideration, but as we have seen, that was important only on the question of the maker's right to revoke.

In *Park v. Whitney*, 148 Mass. 278, there was no consideration. The defendant wrote the plaintiff under date of May 16, 1884, as follows: "As your possible losses on the water meter business are a source of anxiety to you, I will give you my guaranty to take the meter stock from you at cost, without interest, at any time after Jan. 1, 1886, if at that time you desire to have me do so." The plaintiff accepted

July 9, 1886. It was held that the words "at any time" meant then or within a reasonable time thereafter, but that the acceptance, not being until six months after the time specified in the offer, was too late.

In this State, the question of reasonable time is ordinarily one of fact,—*Insurance Co. v. Haynes*, 71 Vt. 306, 45 Atl. 221; *Brainerd v. Van Dyke*, 71 Vt. 359, 45 Atl. 758; *Reynolds v. Reynolds*, 74 Vt. 463, 52 Atl. 1036,—and there is nothing shown by this record to take the case out of the general rule; so the finding on that point is conclusive.

The defendant's letter of August 12, 1901, was admitted in evidence subject to the defendant's exception on the ground of immateriality, only. The letter was clearly admissible on the question of reasonable time, since it tended to explain the delay in the intestate's acceptance of the offer.

The exceptions to the notice of and the receipt for the assessment of June, 1902, become immaterial in view of our disposition of the case, and do not require consideration.

It is urged that the only consideration for the defendant's undertaking set up in the declaration is the intestate's forbearance to sell in reliance upon the defendant's proposition,—and that this has failed in the proof. It is true that the consideration is so set up; but the real consideration for the defendant's agreement to take the stock was the intestate's agreement to turn it over on the terms named; and enough appears in the declaration to show this. This objection, then, that in this and other respects the proof varies from the allegations of the declaration is technical merely, and in no wise concerns the merits of the controversy. The exceptions do not show that any claim of variance was made or passed upon in the court below, where amendment would doubtless have been allowed, if necessary, so the question cannot be considered

here, since it does not "affect the right of the matter." V. S. 1630. The defendant was not entitled to a formal tender of the stock, for he denied the offer, and his refusal to take the stock was absolute. *Amsden v. Atwood*, 68 Vt. 322, 35 Atl. 311.

It was error, however, to allow a recovery for the assessment on the stock; because, if for no other reason, the declaration contains no allegation of special damage,—which would be necessary to such recovery.

A slight error, too, was made in the computation in the court below. The amount paid for the stock with interest thereon to June 26, 1906, is found to be \$3350.66; the amount of the second assessment with interest computed to the same time is found to be \$185.32. The judgment was for \$3543.88, which is manifestly \$7.90 more than the two items amount to.

These errors require a reversal of the judgment, but they in no way affect the plaintiff's right to recover the proper item of damages. They can readily be carved out of the sum allowed below, leaving the correct amount to stand. *Milmore v. Bottom*, 66 Vt. 168, 28 Atl. 872.

Judgment reversed, and judgment rendered for the plaintiff to recover \$3350.66 with interest thereon from June 26, 1906, with costs below.

DOMINICO PEDUZZI ET UX. v. FRANCESCO RESTULLI ET UX.

May Term, 1906.

Present: TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed November 26, 1906.

*Deeds—Covenants—Construction—Right of Way—Indefinite
Description Completed by Parol When Deed Delivered—
Effect.*

Where the houses on two contiguous lots owned by the same persons are so located that the jet of one overlaps that of the other, the provision in a deed by which they convey one of the lots: "The jet on the northerly end of our said house and the jet on the southerly end of the house on the land hereby conveyed are to remain as they now are, with the privilege of all necessary repairing," does not limit either party's right to build on his own land, but only precludes either party from successfully claiming that the other's jet wrongfully overhangs his land.

Where a deed conveying one of two contiguous lots owned by the grantors, also conveys, "A right of way at least ten feet in width from the house on the land hereby conveyed across our land southerly to the street, the same to be used in common with us, our heirs and assigns," and when the deed was delivered one of the grantors pointed out to the grantees the right of way referred to as being along a certain route, and that route afforded reasonably convenient access to the granted premises, it must be taken that the grantees accepted with their deed the right of way as so specified.

APPEAL IN CHANCERY. Heard on pleadings and master's report at the March Term, 1905, Washington County, Rowell, Chancellor. Bill dismissed. The orators appealed.

Edward H. Deavitt for the orators.

John W. Gordon for the defendants.

The fact that the grantor pointed out the right of way to the grantee at the time the deed was delivered fixed the location thereof. *Kinney v. Hooker*, 65 Vt. 333.

POWERS, J. The parties own adjoining lots on the north side of Short street in the city of Barre,—the orators' being situated in the rear of the defendants'. Both lots were derived from common grantors, the orators' deed being dated in October, 1900, and the defendants' in April, 1902. The houses on the respective lots are so located with reference to each other that the north end of the ell of the defendants' house joins the south end of the orators' house, and the jet of one overlaps that of the other. Contained in the deed from the common grantors to the orators is this provision: "The jet on the northerly end of the ell of our (grantors') said house, and the jet on the southerly end of the house on the land hereby conveyed are both to remain as they now are with the privilege of all necessary repairing." Soon after the orators bought their place, they removed a woodshed on the east side of it, and built an addition extending it easterly some fourteen feet. Afterwards and before the defendants took their title the common grantors built an addition to their house extending the ell mentioned easterly about seventeen feet and considerably beyond the east side of the orators' said addition. Then the said common grantors built a piazza on the north end of this addition extending from its northeast corner westerly nearly to the east side of the addition to the orators' building. This was the situation of the buildings when the defendants bought their place.

The orators do not complain of the addition to the defendants' house,—and indeed they could not, for it is expressly found that they consented to its construction—but they insist

that the erection and maintenance of the piazza is a violation of the provision in the deed above recited. We do not take this view of it, however. Reading this provision in the light of the situation of the property at the time the deed was executed, and all the circumstances surrounding the transaction, we do not think the provision was inserted as a restraint on either party's right to build at pleasure on his own land, but rather to guard against the hazard of either party's claiming that the other's jet was on or overhung his land. It seems pretty clear that this is as the parties understood it, else the orators would not have extended their building to the east, and would have at least protested when the piazza was in process of construction. This they did not do, as the master finds that they neither assented nor objected when it was proposed to build the veranda, but allowed it to be constructed as it was. They are hardly in a position to complain now, even if the structure violated the provision referred to,—which we think it does not.

The deed to the orators conveyed a right of way in the following terms: "We also convey to the said Peduzzi and his heirs and assigns a right of way at least of ten feet in width from the house on the land hereby conveyed, across our land southerly to the street, the same to be used in common with us, our heirs and assigns."

The only question made under this grant is as to the location of the right of way granted. The question of the extent of the way is raised in the orators' brief, but the bill sets it up as ten feet in width and the court of chancery was not asked to define its limits, so that question is not before us. The defendants claim that it runs along the west side of their lot, and they have built their fences accordingly. The orators claim that it runs a few feet further east.

The master finds that at the time the orators took their deed, one of the grantors pointed out to them the right of way as located along the fence on the west side of the lot, and that the location so pointed out afforded reasonably convenient access to the orators' premises. In these circumstances it must be held that the orators accepted the way in the location specified with their deed.

Affirmed and remanded.

MARY J. POND v. ADELIA C. POND'S ESTATE.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed November 26, 1906.

*Estoppels—Privy—Executors and Legatees—When Privies
—Evidence—Admissions by Silence.*

Estoppels operate only in favor of parties or their privies.

"Privy" denotes mutual or successive relationships to the same property rights; and privies in representation include executor and testator, and administrator and intestate.

Where the estate consists wholly of personal property, the relation of the executor and a legatee is that of trustee and beneficiary; and in litigation which affects the amount or value of such estate, the executor represents the legatee, the privy between them is complete, and an estoppel operating in behalf of the legatee is available to the executor.

An estoppel is something more than an admission. An admission is mere evidence, while an estoppel gives rise to substantive rights.

He who relies upon an estoppel *in pais* must not only show an express or implied admission, but also reliance and action thereon to his injury in ignorance of the truth.

Although a testator devised to his wife his home farm during her lifetime, and provided that his daughter should have a home thereon as long as she desired, and be supported out of the income thereof, provided she continued to live there and rendered reasonable assistance about the household affairs, since the daughter was under no obligation to remain on the farm, and having decided to leave it, an agreement between the wife and the daughter that the latter should remain on the farm and continue her services and receive from the former a fixed sum of money per week and her support, was a valid contract founded upon a sufficient consideration.

Certain evidence offered by the defendant as tending to show that the claimant made a damaging admission by her silence in the course of certain negotiations conducted in her presence held properly excluded, as the offer did not show that the negotiations had progressed so far that the claimant was called upon to speak.

APPEAL from the decision of commissioners allowing the claim of Mary J. Pond presented against the estate of Adelia Pond; L. Alison Webster, executor. The record does not show the pleadings. Trial by jury at the June Term, 1905, Addison County, *Watson, J.*, presiding. Verdict and judgment for the claimant. The defendant appealed. The defendant called one Bion Wilson as a witness, and offered to show by him, "That at about the time when his service on the farm ended, said Adelia C. Pond in the presence of the plaintiff, Mary J. Pond, offered and proposed to the witness to make a contract with him whereby he should work for her during the remainder of her lifetime, and have his home with her, and that upon her decease he should have her entire property and estate, which she, the said Adelia C. then represented to be two thousand dollars; that the plaintiff participated in the

conversation and heard what was said by the parties, but said nothing about having any claim against Mrs. Pond or the estate; that this conversation occurred at a time when more than four of the six years for which the plaintiff now claims pay for services had elapsed."

Davis & Russell for the defendant.

Estoppel arises when one by his acts, representations, or admissions or by his silence when he ought to speak, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth and do deprive the party who acted upon it of the benefit obtained. 16 Cyc. 723; *Shaw v. Beebe*, 35 Vt. 205; *Strong v. Ellsworth*, 26 Vt. 366.

In order that a person may be estopped by his declarations or conduct he must have knowledge of the purpose of inquiry, in response to which his statement was made and of the interest of the person claiming the estoppel. *Wheeler v. Campbell*, 68 Vt. 98; *Durant v. Pratt*, 55 Vt. 270; *Balis v. LeClair*, 49 Vt. 229; *Hackett v. Callender*, 32 Vt. 97; *Wakefield v. Crossman*, 25 Vt. 298; *Wooley v. Chamberlain*, 24 Vt. 270.

It is essential that the person invoking equitable estoppel has been influenced by and relied on representations or conduct of person sought to be estopped. *Drovin v. Boston & Maine R. Co.*, 74 Vt. 343; *Holman v. Boyce*, 65 Vt. 318; *Wells v. Austin*, 59 Vt. 157; *Earl v. Stevens*, 57 Vt. 474; *Allen v.*

Hodge, 51 Vt. 392; *Clark v. Hayward*, 51 Vt. 14; *Batchelder v. Blake*, 70 Vt. 197.

Where a person by his request or advice has induced another to sell or purchase property, he will be estopped to assert any claim thereto inconsistent with such request or advice. *Swift v. Stovall*, 105 Ala. 571; *Youngblood v. Cunningham*, 38 Ark. 571; *Winchell v. Edwards*, 57 Ill. 41; *Miles v. Left*, 60 Iowa 168; *Sale v. Crutchfield*, 8 Bush (Ky.) 636; *Maple v. Kussart*, 53 Pa. St. 348; *Barclay v. Hendrick*, 3 Dana (Ky.) 378; *Reed v. Hensley*, 2 B. Mon. (Ky.) 254; *Stevens v. McNamara*, 36 Me. 176; *Wells v. Pierce*, 27 N. H. 503.

F. L. Fish and *J. B. Donoway* for the plaintiff.

There was no estoppel of the claimant by what took place in her presence between the testatrix and Hubbard. He did not inform her that her answers would be relied upon. From the facts disclosed, no estoppel can be found, and the case comes fairly within the reasoning of the following cases: *White v. Langdon*, 30 Vt. 599; *Hackett v. Callender*, 32 Vt. 97; *Shaw v. Beebe*, 35 Vt. 204; *Durant v. Pratt*, 55 Vt. 270.

POWERS, J. This is an appeal from the allowance by the commissioners on the estate of Adelia C. Pond of Mary J. Pond's claim for services covering the last six years of the testatrix' lifetime. The claimant is the daughter of Everett B. Pond and step-daughter of the testatrix. By the terms of Everett B. Pond's will, the use of the home farm was given to the testatrix during her lifetime and then to the claimant during her lifetime. It was further provided in the will that the claimant was to have a home on the farm as long as she desired, and be supported out of the income thereof, provided she continued to live there and rendered reasonable assistance about the household affairs. The claimant continued to reside

with the testatrix on the farm and receive her support therefrom for some years after her father's death, but finally concluded to go away and take care of herself. Whereupon it was agreed between the testatrix and the claimant that the latter should remain at the farm and receive from the former for her services, in addition to her support, a fixed sum per week. Afterwards, and about a year and a half before the death of the testatrix, she made a contract with one Hubbard whereby he was to come to and make his home on the farm, carry it on, and in case he survived the testatrix, he was to receive the whole of her estate,—then and now consisting entirely of personal property. This proposed arrangement was fully discussed in the presence of the claimant, who knew all about its terms before it was consummated. While the negotiations for this contract were going on, the testatrix, in the presence and hearing of the claimant, told Hubbard that her estate was estimated at two thousand dollars, enumerated the items of which it consisted, and asserted that it was free from debts. To this last statement, the claimant made no dissent, nor did she ever disclose to Hubbard the existence of her claim for services until after the death of the testatrix; on the contrary she allowed the testatrix' statement to go unchallenged and urged Hubbard to enter into the arrangement. Relying upon these representations of the testatrix and believing them to be true, Hubbard did enter into this arrangement with the testatrix, and on his part fully carried out and performed the same according to its terms; and shortly before her death, the testatrix made her will giving Hubbard the use of all her property with remainder to his children, which was satisfactory to him. The executor defends under the general issue and a notice setting forth the facts herein recited, and relies mainly upon his claim that, in the circum-

stances, the claimant is estopped by her conduct from asserting her claim against the estate.

Under the terms of her father's will, the claimant had a right to remain at home and be there supported out of the avails of the farm,—rendering such service as the will specified. But she was under no obligation to remain there; the option was hers, and she could stay or go as she pleased. So when the time came that she decided to go, the way was open to her to make such arrangement with her step-mother to forego that decision and remain on the place as they might agree upon. And such arrangement, when made, was founded upon a valid consideration and binding, for she had thereby agreed to do, and did in fact do, something which she was not before-legally bound to do. So she has a valid claim which she may assert, unless she is estopped from setting it up against the estate by her conduct during the negotiations between the testatrix and Hubbard. It is claimed that it was her duty, when, in her presence, the testatrix informed Hubbard that there were no debts, to speak out and assert her claim, and not having done so, she will not now be allowed to, to the prejudice of Hubbard, who, being ignorant of the facts and relying upon their being as stated, has acted to his prejudice. That the conduct of the claimant on the occasion referred to amounted to an admission, and was evidence against the claimant tending to show that the testatrix was not then owing her, was fully recognized by the trial court and the estate was given the proper benefit thereof. But an estoppel is something more. An admission is a mere piece of evidence. An estoppel is the basis of substantive rights. In the class to which the one under consideration belongs, the estoppel includes the admission; but the converse of this proposition is not true. In addition to the admission, whether it

be by silence or by positive assertion, there must be a reliance and action thereon to his injury, in ignorance of the truth, by the party who seeks to assert the estoppel, before it becomes the basis of a right of action or defence. 2 Wig. Ev. §1056. Ignorance of the truth of the matter on the part of him to whom the representation is made, being an essential element of an estoppel in his favor, (*Boynton v. Braley*, 54 Vt. 92), it is apparent that the claimant's conduct did not amount to an estoppel so far as the testatrix was concerned, for she knew all the facts, and so could not be misled to her injury by the claimant's omission to deny her statement that there were no debts. But Hubbard was ignorant of the matter; and it was material to the proposition which he was then considering, as it necessarily affected the amount which he was to receive under the proposed arrangement. His situation and relation to the matter made it the duty of the claimant to speak, and since he has acted in reliance upon the fact being as then stated, it would be a substantial injury, if not a fraud upon him to allow the truth to be now asserted. In these circumstances, as against Hubbard, the plaintiff is estopped. *Earl v. Stevens*, 57 Vt. 474; *Wells v. Austin*, 59 Vt. 157.

Estoppels, however, operate only in favor of parties and their privies. *White v. Hazen*, 24 Vt. 143. Hubbard is not a party here, and the estoppel cannot be set up for his ultimate benefit unless he is in privity with the executor. *Simpson v. Pearson*, (Ind.) 99 Am. Dec. 577; *Cutler v. Brockway*, 32 Pa. St. 45. The term "privity," to adopt Prof. Greenleaf's definition, (1 Greenl. Ev. §189) denotes mutual or successive relationships to the same rights of property. In the classification usually stated is found privies in representation, which include executor and testator, administrator and intestate. So between this executor and the testatrix the privity is complete.

But this will not avail him, for as we have seen, from her he can acquire no right of estoppel, as she had none.

It remains to consider whether there is privity between the executor and Hubbard, the legatee. And on this question depends the whole controversy. If the executor can set up the estoppel, it is because he represents Hubbard as well as the testatrix in this litigation. An administrator or executor under our law takes the legal title to the personal property; but not in his own right. He is not the owner of it, except in a qualified sense. His interest in it is in *autre droit*, merely. 1 Woern. Admr. §174; *Weeks v. Gibbs*, 9 Mass. 73. His title is fiduciary, rather than beneficial. *Carter v. Bank*, 71 Me. 448. It is the legal title which he takes, but he takes it as trustee and for a particular purpose. *Lewis v. Lions*, 13 Ill. 117; *Stickney v. Parmenter*, 74 Vt. 58. In a sense, then, when as here the estate consists entirely of personal property, the relation of trustee and *cestui que trust* exists between the executor and the legatee. It follows that in litigation which affects the amount or value of such an estate, the administrator or executor represents the legatee, and the privity between them is complete. 2 Van Fleet For. Adj. §465. The privity between them is the privity of trustee and *cestui que trust*,—the privity which, it is said, was classified in the old books as privity of person. R. & L. Law Dic. "Privity." The real estate, however, descends directly to the heir, and the interest of the administrator is in the nature of a naked conditional power, and the privity between them as to such property is slight or none at all. Van Fleet For. Adj. §466. If this controversy were over the title to a specific article of personal property, which the testatrix had claimed to Hubbard that she owned, and which she had in the claimant's presence promised to give him by will for his services under the con-

tract, the estoppel, if proved, would be available to the executor who would represent Hubbard in the suit. It is true that this controversy is not over the title to any of the assets of the estate and does not directly concern such assets; but indirectly and necessarily the assets are affected, for the recovery must come out of them, and no logical reason can be given why the same rule should not govern the rights of the parties. We hold, therefore, that the estoppel is available to the executor in this suit, and the evidence establishing it being undisputed, the defendant estate was entitled to a verdict under its motion.

The exception to the exclusion of the testimony of the witness Wilson is not sustained, as it does not appear that the negotiations with him had progressed so far that the claimant was called upon to speak. Hence her silence did not amount to an admission.

Nor was there error in excluding the question asked of Mrs. A. A. Pond, since it does not appear what her answer would have been if allowed.

Reversed and remanded.

DAVID DUTTON v. O. N. STOUGHTON.

May Term, 1905.

Present: ROWELL, C. J., TYLER, MUNSON, HASELTON, and POWERS, JJ.

Opinion filed November 26, 1906.

Prescriptive Rights—Dams—Overflowing Lands—When Prescription Begins to Run—Mere Claim of Right—Effect—Evidence—Town Clerk's Minute on Land Records.

The burden of establishing a prescriptive right is on him who asserts it.

No prescription begins to run until a right of action accrues; and no right of action accrues until an injury is inflicted.

The defendant's mere *claim* of a right to maintain his dam at a stated height, though persisted in, after notice thereof to the orator, for the time requisite to create a prescriptive right, would not result in the defendant's having the right to maintain his dam at that height, as against the orator whose lands would be thereby flooded.

On the land records of the town where defendant's water privilege is situated, and immediately following the record of the deed of one of defendant's ancient lineal grantors, is the following memorandum in the hand of and attested by the then town clerk: "The dam on said privilege rebuilt August, 1854, by L. B. Wright, 7 feet 4 inches in height from a bolt in the rock about or near the middle of said dam." *Held*, in a suit in equity to restrain defendant from maintaining said dam at such a height as to flood the orator's land, that said memorandum is only an unofficial statement of the town clerk,—a mere narrative of a past transaction, which gained nothing as evidence by being indorsed on said records.

APPEAL IN CHANCERY, Windsor County. Heard at Chambers, March 21, 1905, on pleadings, master's report and exceptions thereto, *Watson*, Chancellor. Exceptions overruled and decree perpetually enjoining the defendants "from erect-

ing or maintaining a dam or other obstruction in the stream below the orator's said lands, which will cause the waters of said stream to set back and flow upon the lands of the orator." The defendants appealed. The opinion fully states the case.

M. M. Wilson and *R. M. Harvey* for the orator.

J. D. Denison and *Tarbell & Whitham* for the defendants.

Nonuser for any period less than fifteen years creates no break in the continuity of possession, unless the intent to abandon is also shown. *Webb v. Richardson*, 42 Vt. 465, 474; *Aldrich v. Griffith*, 66 Vt. 390.

POWERS, J. The orator owns a valuable meadow located on the "Second Branch" of White River in Royalton. The defendant Stoughton owns a water-power on the Branch a little below the meadow, and there maintains a dam and equipment, and utilizes the same for the generation of electricity for lighting the stores and buildings in Royalton and South Royalton. This bill is brought to prevent the defendant from so maintaining his dam as to overflow the orator's meadow.

The orator does not deny the defendant's title, or his right to maintain his dam, but he does deny the right to maintain a dam so high and so tight as to set the water back over the meadow.

The defendant's title to the water power traces back to a deed from Dow Crane and wife to Lucius B. Wright and Horace A. Lyman, dated and recorded February 28, 1853. In 1854, Lyman and wife conveyed the same to Wright, and by successive conveyances the title came to the defendant Stoughton on January 15, 1877. None of these deeds define

the extent of the flowage right appurtenant to the property, but it is found that they cover this right, whatever it turns out to be. On the Land Records of Royalton, immediately following the record of the deed from Lyman and wife to Wright, appears the following memorandum in the handwriting of Calvin Skinner, who was then the clerk of that town.:

"The dam on said privilege rebuilt August, 1854, by L. B. Wright, 7 feet 4 inches in height from a bolt in the rock about or near the middle of said dam.

Attest,

Calvin Skinner,

Recorded April 24, 1855.

Town Clerk."

It is to the height stated in this memorandum that the defendant claims the right to maintain his dam; and it appears from the report that such a dam would, if made tight, set the water back over certain portions of the orator's meadow and cause him substantial damage.

Prior to 1901, the dam in question had been maintained at varying heights and in different conditions of repair,—particular reference to which is here unnecessary. In that year it was thoroughly repaired by the defendant, and the electric light station erected and a supplemental steam plant installed. Flash boards were then added to the dam, thereby raising it to the height of seven feet and three and one-half inches from the iron pin mentioned in the memorandum. It is of these flash boards that the orator especially complains, as they cause the waters of the pond to overflow his meadow as stated. The defendant has always claimed the right to maintain his dam to the height specified in the memorandum above referred to, and this the orator knew and denied; and in July, 1900, the orator, by letter, warned the defendant against raising the dam so as to flow the meadow.

It is apparent from the findings that the defendant shows no title by grant of a right to flow the orator's meadow. No deed purports to convey that right, nor does the memorandum on the town records afford any evidence of such a right. The defendant claims, however, that this memorandum tends to prove what Wright claimed his right of pondage to be, that it was such notice to the orator, since he knew of it; and that it was a challenge to any one interested, to test the claim. These claims are not sustained. The memorandum is nothing more than an unofficial statement of the town clerk,—a mere narrative of a past transaction. Its indorsement upon the record book was not required by law, and it gained nothing as evidence by being so indorsed. *Bush v. Van Ness*, 12 Vt. 83; 1 Elliott Ev. §405.

But were it to be received as evidence on the grounds claimed for it, it would not affect the result of the controversy. Notice of the claim of a right to maintain a dam to a given height, alone, would not, though persisted in for the requisite period, result in a prescriptive right to flow the meadow. Indeed, the actual maintenance of the dam to that height for the specified time, would not necessarily so result. It is only when the dam begins to be so maintained that the orator's meadow is actually injured by the back-water, that prescription begins to run. This has been the law of this State ever since it was so decided in *Hurlburt v. Leonard*, Brayt. 202. "No prescription begins to run," says Judge REDFIELD in *Norton v. Valentine*, 14 Vt. 239, "until a right of action accrues; and no right of action accrues until injury is inflicted." And this rule has been consistently followed by this Court down to the present time. *Lawrie v. Silsby*, 76 Vt. 240, 56 Atl. 1106. The erection of the dam was no invasion of the orator's rights. It was only the subsequent use of it, in case that use threw.

the water onto his land, of which he could rightfully complain. *Sargent v. Stark*, 12 N. H. 332; *State v. Suttle*, 115 N. C. 784. Not only does the report fail to show that the water was thus thrown back onto the orator's land to his injury, but it expressly finds that "the evidence did not show whether such flooding had ever interfered with use of meadows before 1901, to the extent of actual damage."

The burden of establishing a prescriptive right lies upon him who asserts it. *Gould Wat.* §341. This defendant, though he may have shown a claim of the right for the required time, has not shown an exercise of the claimed right for the time required, and so has failed to establish the right.

Our disposition of the case will doubtless result in some extra expense to the defendant, but the situation presented does not require us to withhold the equitable relief to which the orator is plainly entitled.

Decree affirmed and cause remanded.

LAMORA WHITTIER v. F. H. McFARLAND.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
MILES, JJ.

Opinion filed December 4, 1906.

*Divorced Parents—Minor Child—Petition for Custody Under
V. S. 2698—Jurisdiction of County Court—Effect of
Pending Habeas Corpus Proceeding—Courts—Concur-
rent Jurisdiction.*

Since the county court at the time of granting a divorce has power to make such orders concerning the care and custody of the minor children as the circumstances require, the effect of V. S. 2698, providing that at any time thereafter, on the petition of either party, that court may make such further or additional orders concerning such care and custody as it may deem expedient, is that the county court retains the jurisdiction of that subject-matter which it acquired in the divorce proceeding; and a proceeding under that statute will be treated as a further proceeding in the original case, which should be brought forward on the docket.

Of courts having concurrent jurisdiction of the same subject-matter, the one that first acquires jurisdiction retains it to the end, to the exclusion of the others.

Where the father and mother of a minor child were divorced by the county court for the fault of the mother, but with no order as to the custody of the child, notwithstanding that a judgment, rendered in a habeas corpus proceeding subsequently brought before a judge of the Supreme Court, took the custody of the child from the mother and gave it to the father, and ordered that "these proceedings shall stand open for such further action as may hereafter be adjudged by this Court to be right and proper in relation to the custody of said minor," said county court had jurisdiction of a petition thereafter brought, under V. S. 2698, by the mother against the father to obtain the custody of the child.

It is not decided whether, on such habeas corpus proceedings, a judge of the Supreme Court has concurrent jurisdiction with the county court of the custody of the minor child.

PETITION by one divorced parent against the other for custody of their minor child. Trial by court at the June Term, 1906, Lamoille County, *Powers*, J., presiding. Judgment awarding the custody of the child to the petitioner. The petitionee excepted. The petitionee filed a plea to the jurisdiction of the court, relying upon the pendency of the same subject-matter before a judge of the Supreme Court on habeas corpus proceeding. To this plea the petitioner demurred. Demurrer sustained, and plea adjudged insufficient, to which the petitionee excepted. Exception ordered to lie, and trial

had on the merits. The judgment in the habeas corpus case awarded the custody of the child to the petitionee herein, and concluded as follows: "And finally, it is ordered that these proceedings shall stand open for such further action as may hereafter be adjudged by this court to be right and proper in relation to the custody of said minor." The petition is dated April 27, 1906. It appeared that no further proceedings were had or orders made in the habeas corpus case after said judgment therein was rendered. At the trial of this case the judgment in the habeas corpus case was treated as *res adjudicata* as to all that transpired before the date of the final hearing therein. The petitioner and the petitionee were divorced upon the petition of the latter, and no order was made as to the custody of their child.

J. W. Redmond for the petitionee.

The judge of the Supreme Court has full jurisdiction of the subject-matter of this suit on the habeas corpus proceeding which is still pending before him. *In re Barry*, 42 Fed. 113; *Green v. Campbell*, 26 Am. St. Rep. 843, 25 Cent. Dig. Column 1027, §84; *Hochheimer, Custody of Infants*, §§61, 62.

Hence the county court had no jurisdiction, for of two courts having concurrent jurisdiction that one which first acquires jurisdiction retains it to the end, to the exclusion of the other. *State, Use of, etc. v. Delley et al.*, 1 Atl. 612; *Wright v. Williams*, 48 Atl. 397; *Thomas v. Adams Ex. Co.*, 39 Atl. 1014; *State v. Fredlock*, 94 Am. St. Rep. 932; *Ewing v. Malleson*, 93 Am. St. Rep. 299; *Leigh v. Green*, 89 Am. St. Rep. 751; *Reisner v. R. R. Co.*, 59 Am. St. Rep. 84; 29 Am. St. Rep. 310; *Stearns v. Stearns*, 16 Mass. 167.

Clarence H. Senter for the petitioner.

WATSON, J. The petition alleges among other things that the petitionee and the petitioner were formerly husband and wife; that as the fruit of this union Blanche McFarland was born unto them and is now fifteen years of age; that a bill of divorce was granted to the petitionee by the county court within and for the county of Lamoille, and the custody of the minor child was given to the petitionee, but that the child always lived with and was supported by the petitioner until the twenty-first day of March, 1905, when a writ of habeas corpus was issued, and upon hearing the custody was given to the petitionee. These allegations are not denied by the plea in abatement, hence they stand admitted. The plea sets forth in substance that habeas corpus proceedings were brought before a judge of the Supreme Court to determine the same questions involved in this case, a hearing had and a judgment rendered therein, and that by said judgment those proceedings are still pending before said judge with full and complete jurisdiction in the premises, etc.

This plea was properly adjudged insufficient on demurrer. The court by which the divorce was granted, at the time of granting it, had the power to make such order or decree concerning the care, custody and maintenance of the minor child as the circumstances required, and by statute it retained jurisdiction of this subject-matter and could at any time thereafter, on petition of either party, annul, vary or modify the order so made, or make such other or further decree respecting the care, custody and maintenance of the child as it might deem expedient. V. S. 2698. A petition for this purpose, even though it be not in terms so made, will be treated as a further proceeding in the case in which the divorce was granted, and that cause should be brought forward on the docket. *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817.

Since the county court for Lamoille county had and retained jurisdiction of the subject-matter for such purpose, its jurisdiction could neither be superseded nor taken away by subsequent habeas corpus proceedings before a judge of the Supreme Court.

It is urged that a judge in such proceedings has concurrent jurisdiction with the county court of questions respecting the care and custody of minor children. If this be true,—a question we do not decide,—it will not avail the petitionee in this case; for it is a well established rule that in cases of concurrent jurisdiction the court first acquiring it will retain it to the end, to the exclusion of other tribunals. *Bank of Bellows Falls v. The Rutland and Burlington R. R. Co.*, 28 Vt. 470.

Judgment affirmed.

TARBELL & WHITHAM v. HORACE GIFFORD ET AL.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed December 4, 1906.

Unincorporated Associations—Unsatisfied Execution Against Association—Individual Liability of Members—Supplemental Suit—Construction of V. S. 1183.

In V. S. 1183, providing that, if an execution on a judgment obtained against a partnership, association, or company in its firm name is returned unsatisfied in whole or in part, a supplemental suit

for the amount unpaid may be brought against "any or all" of the partners or associates, the phrase "any or all" means "some," however few or many; therefore, such supplemental suit may be brought against one, or more, or all of the partners or associates who were such when the liability merged in the judgment was created.

ASSUMPSIT on V. S. 1183. Heard on demurrer to the declaration and motion to dismiss, at the December Term, 1905, Windsor County, *Miles*, J., presiding. Judgment sustaining the motion and dismissing the declaration. The plaintiffs excepted. See *ante* page 1.

Hunton & Stickney for the plaintiffs.

N. L. Boyden for the defendants.

WARSON, J. This suit is brought upon section 1183 of Vermont Statutes. The defendants move to dismiss the second amended declaration, also the action, on the ground that more than one and not all of the associate members of the Union Agricultural Society are made defendants. It is urged that by that section the liability is not only contractual but joint and several, and that in analogy to common law principles the suit must be brought either against all the members jointly or each of them separately.

The relation of the members composing such partnerships, associations or companies, as are within the purview of section 1183, is as to each other and to third persons that of partners, and the judgment to recover which an action may be had on that statute is conclusive in respect to all matters involved in the suit upon all persons who were members when the liability merged in the judgment was created. *F. R. Patch Mfg. Co. v. Capeless et al.*, 79 Vt. 1, 63 Atl. 938.

While it is the established rule at common law regarding partnerships that all their contracts, as far as creditors are concerned, are joint and several in the sense that each member is bound for the whole debt, and that not only the joint property but also the separate property of each member may be attached for the debts due from the partnership, yet the contracts are technically joint, and several suits cannot be maintained at law against the individual partners. *Washburn et al. v. Bank of Bellows Falls*, 19 Vt. 278; *Bardwell v. Perry et al.*, 19 Vt. 292.

The purpose of the provisions of section 1183 is to enable execution creditors to satisfy their judgments obtained against a partnership, association, or company in its firm, associate, or company name, to the extent they remain unsatisfied by the joint property, out of the separate estates of the individual members. And in analogy to the right at common law to attach the separate property of each member, we think the term "any," as there used in the phrase "any or all," should not be given its limited sense, but its enlarged and plural sense, meaning some, however few or many; an indefinite number. Under this construction, such a supplemental suit may be brought against one, or more, or all of the partners, associates, or shareholders. The motion to dismiss, in both of its features, should have been overruled.

We have deemed it best to dispose of this question on the substantial ground, regardless of whether it was properly raised by motion to dismiss or not.

Judgment reversed and cause remanded.

JAMAICA SAVINGS BANK v. LESTINA AND SYLVIA HOWARD'S
EXECUTOR.

October Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed December 4, 1906.

*Mortgages—Construction—Subsequent Mortgagee—Subroga-
tion—Foreclosure—Mortgage of Two Parcels of Land—
Second Mortgage of One Parcel with Covenants of Title
—Effect—Taxes—Voluntary Payment.*

Where a person owning two separate parcels of land, a farm and a pasture, both subject to the same mortgage, gave a second mortgage on the farm, which mortgage, immediately after the description of the premises, stated that "said land is subject to" the first mortgage,—describing it, but contained full covenants of title, except that the covenant against incumbrances was that the premises "are free of incumbrance, except as aforesaid," which was followed by, "and I will warrant and defend the same against all lawful claims whatever," the second mortgage conveyed the farm with full and unmodified covenants of title, and the mortgagor thereby in effect covenanted with the mortgagee to discharge the existing incumbrance on the farm, and, as between them, the mortgagee acquired the equitable right to have the burden thereof cast upon the pasture, and the record of the second mortgage is constructive notice of that equitable right.

In a suit to foreclose the second mortgage, brought against defendants, whose only rights were those of the second mortgagor and of the person to whom she had conveyed the pasture after the second mortgage was recorded, it appearing that the orator, in order to save its estate, had been compelled to incur expense in fulfilling the condition of the first mortgage, the orator, under the first mortgage, was entitled to a decree foreclosing all defendants' rights and interest in the pasture.

It not appearing that the collector of taxes did any official act indicating his intention to pursue the land for the overdue taxes on the

farm and pasture, the payment thereof by the orator, upon the mere threat of the collector to enforce collection, was voluntary, and the orator can have no relief therefor under either mortgage.

APPEAL IN CHANCERY. Heard on pleadings and master's report at the April Term; 1905, Windham County, *Tyler*, Chancellor. Decree for the orator, including the item of taxes. The defendants appealed.

On December 14, 1858, Jared Howard was the owner of what is here called the "Home Farm," then occupied by himself and wife as a homestead in the town of Jamaica. He was also owner of another piece of land called the "Banyard Pasture," situated not far from the "Home Farm," but not adjoining it. On that day Jared and his wife conveyed the farm and the pasture to their son Obediah Howard, and Obediah and his wife executed a mortgage deed of the same back to Jared and wife, conditioned for their support during their lifetime, and also for the support of Taft Howard, an insane son of Jared and wife, and a brother of Obediah, then about thirty years of age and living on the farm with his parents. The part of the condition which relates to Taft reads: "Also provided the grantor, his heirs, executors, administrators or assigns shall well support and maintain on the farm described herein, my brother Taft Howard, during his natural life; also pay and discharge all his funeral charges, and furnish and set up at his grave a suitable gravestone, furnishing said Taft Howard at all times during his natural life all needed assistance, provisions, clothing, firewood, medicine, medical care and nursing, together with a suitable and proper place of residence upon the farm described herein." The two deeds were duly recorded, and Obediah and wife took possession of the property and carried out the conditions of the mortgage until April 10, 1861, when they conveyed all of the same lands to

Lestina Howard, a sister of Obediah, subject to the above named mortgage which she assumed and agreed to carry out. Obediah and wife then moved away, and Lestina took charge of the property and assumed the control of affairs under the deed to her. Thus she remained until her decease in the year 1902. She died testate and Edgar M. Butler was appointed executor of her will.

April 21, 1877, Lestina borrowed the sum of six hundred dollars of the orator and executed to it a mortgage on the "Home Farm," describing it by boundaries, to secure her note for that amount payable to the orator or bearer, with interest semi-annually. Immediately following the description of the premises conveyed, the mortgage contains the recital, "Said land is subject to a life lease or mortgage, for the support of Taft Howard during his natural life." This mortgage was with full covenants save the covenant against incumbrances which reads: "that they (premises) are free of incumbrances, except as aforesaid," referring to clause above quoted showing the Taft Howard lease or mortgage. Then follows "and I will warrant and defend the same against all lawful claims whatever." It is to foreclose these mortgages that these proceedings are had.

March 5, 1883, Lestina conveyed by quitclaim deed one undivided half of all these same lands to her sister Sylvia Howard, and on March 5, 1884, Lestina conveyed to Sylvia by warranty deed the Banyard pasture, "except a quitclaim deed of one undivided half which the said Sylvia Howard has from me, the said Lestina, bearing date March 23, 1883, recorded in Book 21, page 40, of the Jamaica Land Records."

Sylvia died testate while Lestina was yet alive, and her will was duly probated, allowed, and recorded in the Land Records of Jamaica. The will contained clauses as follows:

"Sixth. I give, devise and bequeath to my sister Lestina Howard, all of my real and personal estate and effects of whatever description of which I shall die seized and possessed, to have and to hold and to be for her sole use, benefit, control and behoof forever."

"Seventh. It is my will that in the event that my sister Lestina shall not use all that I bequeath to her, that the residue be divided into three equal parts; that one-third be given to the Baptist church in Jamaica, towards the support of preaching of the gospel according to the faith and practice of the Baptist denomination. It is my will that one-third be given to the late Ranney Howard's four children respectively, Mark W. Howard, Kurk R. Howard, May V. Howard, and Hugh J. Howard, and it is my will that the remaining one-third be given to my two brothers Iziah Howard and Obediah Howard, respectively, for their sole use and benefit forever."

Taft Howard continued insane and incapable of taking care of himself the entire period from the time the mortgage was given by Obediah and wife until Taft's decease in October, 1904.

On January 10, 1891, J. Q. Shumway of Jamaica was appointed Taft's guardian, and was also appointed administrator on the estate after his decease. Lestina supported her father and mother as long as they lived, which was several years after she took possession. She also supported and maintained Taft on the "Home Farm" as long as he lived, except what was done by the orator as hereinafter stated. Toward the latter part of her life she became financially unable to pay the interest on the mortgage note to the bank, the taxes on the place, the insurance, and at the same time support and maintain Taft, by reason whereof she ceased to pay interest July 1, 1897, and was unable to pay the taxes on the land for

the years 1899, 1900, 1901, and 1902. After the death of Lestina, the officers of the orator called upon her executor to furnish means for the support of Taft, which he declined to do, alleging as a reason the want of funds in the estate to enable him to do so, and he has never paid anything toward the support.

There is due the bank on the mortgage note the sum of six hundred dollars with interest from July 1, 1897. In 1903, taxes for five years had accumulated on the "Home Farm" and "Banyard Pasture," and the collector of taxes threatened to enforce their collection, whereupon the orator paid the taxes for the years 1902 and 1903, amounting to ninety dollars and forty-nine cents. It also paid the taxes for the years 1899, 1900, and 1901, amounting to the sum of one hundred twenty dollars and fifty-five cents, and the taxes for the year 1904, forty-two dollars and sixty-one cents, and the taxes for the year 1905, forty-one dollars and sixty-one cents. The orator paid for keeping Taft Howard after Lestina's death one hundred dollars, and for extra care of him four dollars and fifty cents; undertaker's bill for his burial thirty-five dollars and fifty cents; to the officiating clergyman three dollars; for digging grave four dollars; and for lettering gravestone eight dollars. The orator paid insurance on the buildings, ten dollars and fifty cents, and for repairs on the building on the "Home Farm," twenty-three dollars.

Waterman & Martin for the orator.

The defendants cannot complain of the payment by the orator of anything necessary to be paid in order to protect its security. *Davis et al. v. Hullett*, 58 Vt. 90; *Ottaquechee Sav. Bank v. Holt*, 58 Vt. 166; *Joslyn v. Berlin*, 54 Vt. 670.

Butler & Moloney for the defendants.

The pasture having been conveyed away by covenants of warranty cannot now be charged with the first mortgage for support, because that is otherwise well secured. *Deavitt v. Judevine*, 60 Vt. 695; *Lyman v. Lyman*, 32 Vt. 79; *Root v. Collins*, 34 Vt. 173.

The payment of the taxes by the orator was a mere voluntary act, and it can have no aid therefor under either mortgage. *Fulton v. Aldrich*, 76 Vt. 310; *Pitkin v. Parks*, 54 Vt. 301; *Hutchins v. Moody*, 34 Vt. 433; *Cummings v. Holt*, 56 Vt. 384.

WATSON, J. The mortgage conditioned for the support, etc., of Taft Howard was the first incumbrance on the "Home Farm" and on the "Banyard Pasture." The orator's mortgage was a subsequent incumbrance covering the "Home Farm" only. By this mortgage, however, the whole estate of the farm was granted with warranty. This is manifest from the fact that the clause showing the land to be subject to a life lease or mortgage for the support of Taft Howard is in a paragraph independent of the description of the premises granted, and that the mortgage contains full covenants unmodified by reason thereof, 'except against incumbrances, the latter being immediately followed by the covenant to warrant and defend "against all lawful claims whatever." Thereby the mortgagor in effect covenanted with the mortgagee to discharge the existing incumbrance on the premises thus conveyed, and as between them the mortgagee acquired the equitable right to have the burden thereof cast upon the other portion of the mortgagor's property covered by the common incumbrance. *Deavitt v. Judevine*, 60 Vt. 695, 17 Atl. 410; *Lyman v. Lyman*, 32 Vt. 79; *Root v. Collins*, 34 Vt. 173.

The record of the orator's mortgage was constructive notice to Sylvia Howard of this equitable charge on the "Ban-yard Pasture" when she subsequently purchased it, and she took her title subject thereto. See cases above cited.

The report shows that to save its estate the orator paid for keeping Taft and for extra care of him after the death of Lestina, his funeral and burial expenses, and for lettering his gravestone the aggregate sum of one hundred fifty-five dollars. The orator by reason thereof will be subrogated to all the equitable rights of Taft Howard under the mortgage for his support, etc., and since as between the farm and the pasture this burden was by the mortgage to the orator made to rest primarily on the pasture, the orator is entitled under the first mortgage to a decree of foreclosure of all rights, title, and interest possessed by the defendants therein. *Lyman v. Lyman*, before cited.

The report states that the collector of taxes threatened to enforce collection of the taxes which had accumulated on the two pieces of property, and that thereupon the orator paid the taxes as set forth in the statement of this case. It does not appear that the collector did any official act indicating an intention to pursue the land, hence the orator was not justified in treating the taxes as an incumbrance on the land. It follows that the payment of them was voluntary and the orator can have no relief under either mortgage therefor. *Fulton v. Aldrich*, 76 Vt. 310, 57 Atl. 108.

No question is made but that the orator is entitled to a decree of foreclosure of its mortgage on the "Home Farm." Nor is any question made but that the sums paid by it for insurance and for repairs on the buildings should be allowed as part of the sum due in equity.

Decree reversed and cause remanded with mandate that a decree be entered for the orator in accordance with the views here expressed. Let the costs in the court below be there determined.

STATE v. A. J. WILSON.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
MILES, JJ.

Opinion filed December 5, 1906.

*Criminal Law—Pleading—Statutory Offence—Sufficiency of
Indictment—Charging Offence in Language of Statute—
When Sufficient—Constitutional Questions—When Con-
sidered.*

The allegations of an indictment must be certain enough to give the respondent reasonable notice of what will be produced against him at the trial.

Whether an indictment in the words of a statute is sufficient, depends upon the statutory statement of the offence. If everything necessary to constitute the offence is charged or necessarily implied by following the language of the statute, an indictment in the words of the statute is sufficient, otherwise not.

An indictment for practicing medicine without a license, in violation of No. 133, Acts 1904, wherein the only allegation of the commission of an offence by the respondent is that he "did hold himself out to the public as a practicing physician in this State," is bad on demurrer.

Courts will not pass upon the constitutionality of a statute, unless it is necessary to do so in order to finally determine the case.

INDICTMENT for practicing medicine without a license, in violation of No. 133, Acts 1904. Heard on demurrer to the indictment at the June Term, 1906, Lamoille County, *Powers*, J., presiding. Demurrer overruled, *pro forma*, and indictment adjudged sufficient. The respondent excepted. The opinion states the material part of the indictment.

T. R. Gordon and *R. W. Hulburt* for the respondent.

The statute is unconstitutional, in that it deprives a physician of his property without due process of law. *Cummings v. State*, 4 Mo. 320; Cooley Const. Lim., 106 (5th ed.).

F. G. Bicknell, State's Attorney, for the State.

Laws regulating the practice of medicine are uniformly sustained where they reasonably serve to protect the public safety. 25 W. Va. 1; 121 Ill. 84; 36 Neb. 241; Cooley Const. Lim. 718.

TYLER, J. This case is here upon demurrer to an indictment found against the respondent for practicing medicine without a license in violation of the laws of the State. The material allegation is that the respondent "did hold himself out to the public as a physician in this State, without having * * * passed the examination required by law, * * * and without having received a license from the Medical Registration * * * to practice as a physician."

The only specification of the commission of an offence by the respondent is contained in the words, "did hold himself out to the public as a practicing physician in this State." The respondent contends that this is insufficient under the rules of criminal pleading; that he is entitled to be informed of the

manner in which the State claims that he held himself out as a physician.

It is generally sufficient to charge the offence in the language of the statute, without a further description, where the act prohibited is itself unlawful; and if the complaint substantially follows the act and by its natural construction charges the offence described therein, it will be good. On the other hand, a complaint is not sufficient, though it charges the offence in the exact language of the statute, where the words of the statute do not embrace a definition of the offence, or where the acts are not in themselves unlawful. 10 Ency. Pl. & Pr. 50. This is in accord with the general rule laid down in 1 Chit. Crim. Law, 228, 230, and in Bish. Crim. Pro. §284, that all indictments ought to charge a man with a particular specific offence, and not with being an offender in general; for no one can know what defence to make to a charge which is thus uncertain. Whether an indictment in the words of a statute is sufficient or not, depends upon the manner of stating the offence in the statute. If every fact necessary to constitute the offence is charged or necessarily implied by following the language of the statute, the indictment in the words of the statute is undoubtedly sufficient, otherwise not. 1 Arch. Crim. Prac. & Pl. 268. In the well considered and often cited case, *State v. Higgins*, 53 Vt. 198, it is said that while an indictment founded upon a statute must follow the words of the statute and state all the circumstances enumerated by it, in defining the offence, it frequently happens that such a description is not in itself sufficiently minute and specific. The complaint in that case was framed under an Act which made it an offence for any person to act as the agent of another in the sale of spirituous liquors; held, that the complaint was defective on

demurrer in not naming the persons or firms for whom the respondent acted as agent.

In *State v. Benjamin*, 49 Vt. 101, the respondent was indicted for aiding another person in procuring liquors to be disposed of for unlawful purposes. The indictment was held defective in not setting out how he rendered such aid. In *State v. Fiske*, 66 Vt. 434, 29 Atl. 633, the indictment charged the defendant with making public, by print and writing, information as to where the means for committing a criminal act could be obtained; held that the indictment should have alleged the manner in which the print and writing were circulated and made public. In *State v. Soragan*, 40 Vt. 450, it was decided that a general allegation of disobedience by a respondent of an order of the health officer of a city was too loose for criminal proceedings; that the order and the act of disobedience should have been set out.

It has been decided by some courts, under statutes prohibiting the practice of medicine without a license, and which enumerate various acts which shall be regarded as "practicing medicine," that an indictment charging the offence must allege some one of the acts so enumerated. *Hughes C. L. & Pro.* §1883 and notes.

There are various ways in which the respondent might have held himself out to the public as a physician, and he is entitled to know in what manner the State claims he "held himself out" before he is compelled to plead. As the rule is sometimes stated, the allegation must descend far enough into particulars, and be certain enough in its frame of words to give the respondent reasonable notice of what will be produced against him at the trial. We think the allegation in the indictment does not fulfil the respondent's right under the

constitution "to demand the cause, and nature of his accusation."

Our decision upon this point makes it unnecessary to consider the constitutional question raised by the exceptions. *Blanchard v. Barre*, 77 Vt. 420, 60 Atl. 970.

Demurrer sustained, indictment held insufficient and quashed; judgment reversed, verdict set aside, respondent discharged.

NORMAN McKENZIE v. BOUTWELL & VARNUM.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed December 6, 1906.

Bailments—Negligence of Bailee—Violation of Terms of Bailment—Trover, and Case for Negligence—Evidence—Value—Remoteness of Time—Discretion of Court—Repair of Road After Accident—Motion for Verdict—Questions for Jury—Improper Argument—Effect of Full Retraction—Motion to Set Aside Verdict.

In an action against the bailees of a horse for its death resulting from injuries caused by defendants' alleged negligence, where defendants' counsel in answer to an inquiry by the court said, "Whether there was any negligence afterwards in the care of the horse I don't know," it was proper, as bearing upon defendants' possible claim that the horse died from plaintiff's negligence, to allow him to testify that immediately after the accident one of

the defendants directed him to take the horse to the former's barn for treatment.

When asked the value of the horse, plaintiff twice improperly answered, "I value him at \$300," but when asked the third time, he properly answered, "Well, between \$275 and \$300." *Held*, that, as the verdict was for a much smaller sum than any of the plaintiff's estimates, his two first answers could not have influenced the jury.

Plaintiff's witness having testified that, after having owned and used the horse for a year, he sold it to plaintiff, and had seen it occasionally thereafter on the highway, upon being asked to state the value of the horse, the witness was properly allowed to answer: "If he was as sound as I should say he was without having seen him for a year or so and examining him closely, I should say from \$200 to \$225." The remoteness of the times when the witness had last seen the horse only affected the weight of his testimony, and its admission or exclusion on that ground was discretionary with the court.

In an action of trover with counts in case for negligence, brought against the bailees of a horse for injuries resulting in its death, plaintiff's evidence tended to show that the horse was one of a pair of horses let by him to defendants to be worked together on a dump-cart in operating their quarry, and that while working separately on defendants' road leading to their dump, the horse was injured through an insufficiency of the road due to defendants' negligence. Defendants denied both said negligence and that the contract confined them to using the horses together. *Held* that, it appearing that defendants continued to work the surviving horse for a week after the other died, and that plaintiff claimed that this was not under the terms of the original bailment, but that "it was under a different arrangement, that the road was made passable, and that then the other horse remained there to work," it was proper to allow plaintiff to show that after the accident defendants repaired the road leading to the dump, not as tending to show defendants' antecedent negligence, but only as bearing on the question why the surviving horse was allowed to remain and work singly.

The court properly refused to direct a verdict for defendants; because whether they had converted the horse, and if not, whether it was

injured through their negligence, were questions of fact for the jury under proper instruction.

Since, upon defendants excepting to certain improper statements made by plaintiff's counsel in argument to the jury, the matter was promptly and adequately dealt with by the court, and the statements fully retracted by the counsel, there is not sufficient cause for setting the verdict aside for improper argument.

TROVER AND CASE. Plea, not guilty. Trial by jury at the March Term, 1906, Washington County, *Rowell, J.*, presiding. Verdict for the plaintiff to recover \$226 and costs, and judgment thereon. The defendants excepted. The opinion fully states the case.

John W. Gordon for the defendants.

Repairs after an accident cannot be shown for the purpose of proving antecedent negligence. 1 *Jones on Evidence*, §290; *Dale v. D. & C., Co.*, 73 N. Y. 468; *Creamer v. Burlington*, 45 Iowa 627; *Morse v. Minn. & C., Co.*, 30 Minn. 465; *Dougan v. Champlain Trans. Co.*, 56 N. Y. 1.

The remarks of plaintiff's counsel in argument vitiated the verdict in his favor. Counsel knew that these remarks would create sympathy and prejudice. *Magoon v. B. & M. R. R.*, 67 Vt. 177; *Blaisdell et al. v. Davis*, 72 Vt. 308; *Banchu v. Rutland R. Co.*, 71 Vt. 142; *State v. Hannett*, 54 Vt. 83; *Rea v. Harrington*, 58 Vt. 161; *Cutler et al. v. Skeels*, 69 Vt. 161; *Daggett v. Champlain Mfg. Co.*, 71 Vt. 370; *State v. Fitzgerald*, 68 Vt. 125.

M. M. Gordon for the plaintiff.

An exception does not lie to improper argument of counsel, where the objectionable statements are immediately

withdrawn and the matter is promptly dealt with by the court. *McMullin v. Erwin*, 69 Vt. 338; *State v. Young*, 74 Vt. 478; *Kilpatrick v. G. T. R.*, 74 Vt. 288; *State v. Suitor*, 78 Vt. 391.

TYLER, J. The declaration contains a count in trover and two counts in case. Under the first count the plaintiff claimed that he let a pair of horses to the defendants to work together upon a dump-cart in operating their quarry, and that in violation of the contract they worked them separately and put them to a different use than the contract contemplated and thereby converted them to their own use. One of the horses was injured while working alone and died of his injuries. The jury found by a special verdict that the defendants were not guilty of trover, and therefore they must have failed to find the contract claimed by the plaintiff. The verdict was that the defendants were guilty of negligence under the counts in case.

1. The plaintiff was permitted to testify that directly after the accident he had a conversation with defendant Boutwell, who directed him to take the horse to his, Boutwell's, stable for treatment. This evidence was objected to, and the plaintiff's counsel being inquired of by the presiding judge, said that it was offered to show that Boutwell appreciated the situation and considered the defendants liable for the injury—that they had not worked the horses together according to the agreement. The offered evidence was incompetent to show negligence on the part of the defendants in the use of the horse (*Sias v. Consolidated Lighting Co.*, 73 Vt. 35), and it is difficult to see how it could have borne upon the issue whether the contract was as the plaintiff claimed, namely, that the horses were to be worked together and not separately. But pending the question the presiding judge asked the defendants' counsel if they made any question but that the horse died

from the injuries received, and he replied "I do not want to concede—whether there was any negligence afterwards in the care of the horse I don't know. I suppose the first trouble with the horse was this accident" * * * The judge then directed the witness to answer the question and for the evident purpose of showing whether or not any negligence was imputable to the plaintiff in his treatment of the horse after the accident, or whether the horse died of his injuries. The statement made by the defendants' counsel before the question was answered, that he did not question but that the horse died of the injuries received, did not meet the court's inquiry. The answer was clearly admissible as bearing upon any claim that might be made that the horse died from the plaintiff's negligence. The exception taken cannot avail the defendants.

2. The plaintiff was asked by his counsel what was the fair value of the horse, and he improperly answered: "I valued him at \$300." To the court's inquiry he made the same answer, but upon the question being put the third time he seemed to understand what was a proper answer, and said, "well, between \$275 and \$300." It is inconceivable that the plaintiff's first two answers could have harmed the defendants. That the jury were not influenced by them is shown by the fact that the verdict was for a much smaller sum than any estimate of the plaintiff.

3. The witness Smith testified that he owned and used the horses a year and sold them to the plaintiff. Upon being asked to state the value of the horse that died he answered: "If he was as sound as I should say he was without seeing him for a year or so and examining him closely, I should say from \$200 to \$225." He had previously stated that the plaintiff paid for the horses in part by working with them for him, and

that he occasionally met them upon the highway after the sale. There was no error in the admission of the evidence. The witness' estimate of value was predicated upon the horse remaining as sound as when he sold him. The remoteness of the times when the witness had last seen the horse only affected the weight of his testimony. Its admission or exclusion on that ground was discretionary with the court.

4. The plaintiff was permitted to show, under the defendants' exception, that after the accident the defendants repaired the road that led to the dump. The rule is that repairs of a highway by the selectmen of a town, after an accident, cannot be shown for the purpose of proving antecedent negligence. But here the evidence was offered not only to show that the defendants considered the roadway unsafe, but for the further purpose of showing, from the fact that the surviving horse remained there and worked a week after the other one died, that the contract was as the plaintiff claimed in respect to the horses being worked together.

The declaration was framed and the case was tried and submitted to the jury upon two grounds,—one, that by the defendants working the horse singly in violation of the contract, they converted him to their use,—the other, that he was injured through their negligence. The defendants denied both claims. Upon the first ground, if made out, the contract ended with the injury to one horse, and the other was worked thereafter under a new agreement. The plaintiff's offer was, "to show that it was under a different arrangement,—that the road was made passable, and that then the other horse remained there to work," and not under the original agreement. The court inquired of counsel if the evidence was offered to show that the road was soon repaired

and that that was the reason why the other horse remained there to work, and counsel replied that that was the purpose. It was admitted for that purpose only, and the court at the close of all the evidence instructed the jury that they were to consider it only as bearing upon the question why the horse was allowed to remain there and work singly for a week, and not as an admission by the defendants that the road needed repairing. With this restriction and instruction there was no error in admitting the evidence.

5. The court properly refused to direct a verdict for the defendants for the reason that whether there had been a conversion of the horse by the defendants, and if not, whether it was injured through their negligence, were questions of fact for the jury under proper instructions. The court carefully explained to the jury the two grounds upon which the action was brought, and when they rendered their verdict, inquired upon what ground they found the defendants liable, whether for negligence or under the count in trover, and the foreman replied, "negligence."

6. The plaintiff's counsel said in his argument that the defendants did not care what became of the horse; that what they wanted was to get all they could out of him; that they didn't care whether he went over the dump or not; that they had money enough to fight, etc. The remarks were improper, but upon exception being taken thereto by the defendants' counsel they were fully retracted and the matter was so promptly and adequately dealt with by the court that we think there is not sufficient cause for setting the verdict aside.

Judgment affirmed.

W. E. THORP ET AL. v. CHARLES P. CROTO.

May Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, POWERS, and MILES, JJ.

Opinion filed January 8, 1907.

Mortgages—Receipt of Insurance Money by Mortgagor Before Mortgage Debt is Due—How Applied.

Where no portion of the mortgage debt was due at the time a mortgagee received money on a policy of fire insurance procured for his benefit by the mortgagor, he should, in the absence of any direction by the mortgagor, hold the money and apply it to extinguish the mortgage debt, including interest, as fast as the same becomes due; and upon his failure to make that application, the law will make it.

APPEAL IN CHANCERY. Heard on the pleadings and master's report at the December Term, 1905, Lamoille County, Munson, Chancellor. Decree for the petitioner. The defendant appealed.

The petition is to foreclose the defendant's equity of redemption in certain real estate upon which the petitioner holds a mortgage securing six notes of \$200 each, all dated November 16, 1901, and payable in six, seven, eight, nine, ten, and eleven years from date, respectively, with interest annually. In the month of August, 1903, the barn on the mortgaged premises was destroyed by fire, and the insurance, \$247.50, was paid to the petitioner by the insurance company and by him indorsed on the two notes, as stated in the opinion, under date of December 17, 1903. The policy under which this insurance was paid was procured by the mortgagor for the benefit of the mortgagee.

Brown & Hopkins for the petitioner.

When fire insurance money is paid to a mortgagee on a policy of insurance payable to him as his interest may appear, the money reduces the principal of the mortgage debt *pro tanto*. *Town of Brighton v. Doyle et al.*, 64 Vt. 621; *Turner v. Quincy Ins. Co.*, 109 Mass. 573; *Buffalo Steam Engine Works v. Sun Ins. Co.*, 17 N. Y. 406; *Waring v. Loder*, 53 N. Y. 581; *Ins. Co. v. Marshall*, 48 Kan. 235; 31 Am. & Eng. Enc. 2d ed. 171.

C. G. Austin & Sons for the defendant.

In case of loss under a policy of fire insurance made payable to a mortgagee as his interest may appear, the insurance money paid to the mortgagee must be applied on the mortgage debt, if it is due. If it is not due, such application can not be made without the consent of the mortgagor. *Hopkins on Real Property*, 198; 1 *Jones on Mortgages*, §410; *Gordon v. Ware Savings Bank*, 115 Mass. 588; *Quarels v. Clayton*, (Tenn.) 3 L. R. A. 170; *Early v. Flannery*, 47 Vt. 253.

MILES, J., for the majority of the Court.

The question raised in this case is, must the mortgagee receiving money on a fire insurance policy procured by the mortgagor for his benefit, hold that money until some part of the mortgage debt is due and thereafter apply it as fast as it falls due and no faster?

At the time the money was received by the mortgagee no part of the principal nor interest was then due upon the mortgage indebtedness, which then consisted of six promissory notes of two hundred dollars each, bearing date November 16, 1901, and made payable six, seven, eight, nine, ten and

eleven years from date, with interest annually from January 1, 1902. At the time this money was received by the mortgagee, he indorsed it as a payment upon the note first falling due, to the extent of two hundred dollars, thereby extinguishing the principal of that note, if treated as a payment, and leaving due thereon only the interest which had accrued upon it to that date, the first year's interest on all the notes having been paid previous to the receipt of the insurance money by the mortgagee. The balance of the money the mortgagee indorsed generally upon the note next falling due. No direction was given by the defendant mortgagor, to the orator as to what disposition he desired to have made of that money, until some time after the application had been made. His contention now is, that, as no part of the debt was due at the time the money was received, the orator had no right to indorse it upon the debt without his consent until some part of it fell due. It is undoubtedly true that such is the law, and the Court are all agreed that money so received cannot be applied as a payment upon the mortgage debt, if no part is due at the time of application, without the consent of the mortgagor, and a majority of the Court hold that when the debt does fall due, the mortgagee not only may but *must* apply the money to the extinguishment of the debt as fast as the same falls due; that the mortgagee holds such money for the payment of the debt, and the application must be made as the law requires in cases where money is received on a pledge. In *Lewis v. Jewett*, 51 Vt. 378, which was a suit upon two notes against the defendant, secured by the pledge of other notes on which was received a sum of money during the pendency of the suit, it was said by the Court, Ross, J. delivering the opinion: "When the sum came into the plaintiff's hands, by

force of the relation in which he held the Mower notes, it was to be used, so far as was necessary to effect that purpose, to extinguish the balance due the plaintiff from the defendant on the notes in suit. The receipt of this sum by the plaintiff effected and operated upon the suit the same as it would if the plaintiff had received the same sum in payment of the balance due him on the notes in suit." In the case of *Hunt v. Nevers*, 15 Pick. 500, S. C., 26 Am. Dec., 618, Shaw, C. J., says: "It is a general rule, that where collateral security is received for a debt, with power to convert the security into money, this is specifically applicable to the payment of such debt; the same person being the party to pay and receive, no act is necessary, and the law makes the application; if the proceeds equal or exceed the amount of the debt, it is *de facto* paid; no action would lie for it; and proof of these facts would support the defense of payment." To the same effect is the case of *Prouty v. Eaton*, 41 Barb. 409, in which the Court say: "This, as a matter of law, is a payment upon the principal debt. *Prima facie* there is nothing else upon which the money paid could apply." The last named case was one in which the money received was a payment upon a mortgage held as collateral security. Similar cases can be found in other states besides Massachusetts and New York, but no useful purpose could be served in collecting cases upon this point, as the rule for the application of payments received in such cases is well settled and rests upon principle as well as upon authority.

Applying this rule to the case at bar, it follows that the orator had no right to apply the money as he did, but that he should have held it until a part of the mortgage debt fell due, and then should have applied it to the part which had fallen

due, and as it fell due, and upon his failure to make that application, the law will make it.

The master has found that if such application is made, there was nothing due on the mortgage debt at the time the petition was brought and that the petition should be dismissed.

Some question was made on the trial of this cause before the master respecting the defendant's failure to insure the buildings on the mortgaged premises in accordance with the condition of the mortgage, and the master has found that the mortgagor failed in some respects to insure strictly in accordance with that condition; but he also finds that such failure was the result of a misunderstanding on the part of the mortgagor, and his inability to perform the condition in that respect any sooner than he did, after he learned that the insurance had expired and the buildings were not insured as the condition of the mortgage required. He also finds that no damage was occasioned the orator in consequence of this failure, and that after the insurance was effected, the orator has had the possession of that policy and still has it.

In view of the fact that the orator has made in his brief no point of this failure to keep the buildings on the mortgaged premises insured strictly in accordance with the condition of the mortgage, and no damage having resulted from it, we consider it unnecessary to say anything respecting that matter; but pass by it as the orator has done.

Decree reversed with costs in this Court, and cause remanded with mandate that the bill be dismissed.

MILES, J., dissents.

As a general rule, dissenting opinions are more harmful than beneficial; for the opinion of the majority is usually correct, and in many instances would settle the law upon a

new question for the first time raised in that case, but for the doubt and suspicion cast upon it by the dissenting opinion. It is only when the judge cannot conscientiously concur with the majority, and when his dissent, without any reason for it being stated, must appear frivolous and weak to all who do not carefully investigate for themselves, that he is justified in writing a dissenting opinion. Such is my justification for writing this opinion.

The question stated in the opinion of the majority and restated here is, *must* the mortgagee receiving money on a fire insurance policy procured by the mortgagor for his benefit, hold that money until some part of the mortgage debt is due and thereafter apply it as fast as it falls due and no faster?

It is somewhat remarkable that only a few cases can be found in which a question of so much importance has been considered. The question of the application of insurance money, as between the mortgagor and mortgagee, in various circumstances, has quite frequently been before the courts; but I am unable to find many in which the exact question raised in the case at bar, has been passed upon or which contain principles closely analogous to the principles involved in the case at bar. Statements in text books, as well as in numerous cases, can be found strong enough, perhaps, to justify a conclusion that such insurance money *must* be applied to the mortgage debt as fast as the same falls due, if we consider only the language of the statement made or rule laid down, independent of the cases wherein they are made or from which the rule is taken; but, if the investigation goes down into the cases in search of the source of such statements and the foundation upon which they rest, the conclusion must follow, that they do not hold that such insurance money *must* be so applied.

Beginning that investigation with the "Cyc." Vol. 19, p. 885, it is found that the rule laid down by the author of that work is in the following language: "The mortgagee is under obligation to apply the proceeds of insurance taken by the mortgagor for the mortgagee's benefit to the satisfaction or reduction of the mortgage debt."

If this rule is considered in connection with the general subject it will be noticed that the author intended that this rule was subject to limitations, especially those stated in other parts of the work. The rule, if taken strictly literal, would require the mortgagee to make the application as soon as the money was received, whether the debt was or was not then due, and whether the mortgagor did or did not consent to such application; but this the author did not intend, for in another part of his work he lays it down as settled law, that the mortgagee cannot make such application without the consent of the mortgagor, and this last statement has the sanction of all the authorities, in cases free from agreements and modifying provisions upon that subject. Hopkins on Real Property, p. 198; *Gordon v. Ware Sav. Bank*, 115 Mass. 588; *Fergus v. Wilmarth*, 117 Ill. 542 (7 N. E. 508); *Naquin v. Tex. Sav. & R. E. Invest. Association*, 58 L. R. A. 711.

To know the value of any rule or statement of law it is necessary to know whence it sprang and upon what it rests, so I have attempted to trace out to some extent the source from which some of these statements and rules have been taken.

The foregoing rule or statement from the "Cyc.," rests upon the following authorities cited in the note: *Home Ins. Co. v. Marshall*, 48 Kan. 235, (29 Pac., 161); *Concord Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Sterling Fire Ins. Co.*

v. *Beffrey*, 48 Minn. 9, (50 N. W. 922); *McDowell v. Morath*, 64 Mo. App. 290; *Smith v. Packard*, 19 N. H. 575; 28 Cent. Dig. sec. 1447.

An examination of the foregoing cases shows that the questions and facts involved are not similar to the question and facts involved in the case at bar.

In *Home Ins. Co. v. Marshall*, *supra*, the question of application arose upon a suit by the insurance company against the mortgagor to recover the full amount of the mortgage debt, the insurance company having paid the mortgagee the full amount and taken an assignment from him after the buildings were destroyed by fire; in which suit the company sought to deprive the mortgagor of all benefit of the insurance which had been effected and maintained at his own expense. What is said in that case about the application of insurance money, is said with reference to its application by the mortgagee when called upon to account for it in a case in which he is liable to account. The only question here was whether he was liable to account. If he was liable to account, there was no question but that it should be accounted for in that case in reduction of the mortgage debt.

In *Concord Mut. Fire Ins. Co. v. Woodbury*, *supra*, the mortgagee effected the insurance, and upon payment of his mortgage by the insurance company after the property was destroyed by fire assigned the mortgage and debt to them. Afterwards they brought suit against the mortgagor for the possession of the mortgaged premises, and it was held that the action could be maintained. What is said about the application of insurance money is not called for by any question raised in the case, and is based on *King v. State Mut. Fire Ins. Co.*, 7 Cush. 1. This case simply holds that a mort-

gagee may recover for his own use on an insurance policy obtained by *himself at his own expense*. Judge Shaw in his opinion, however, discusses the rights of the mortgagor where he effects the insurance for the benefit of the mortgagee, but that question is not raised in the case and the judge cites no authorities to support his opinion in this respect. What he said in this respect is mere *obiter dicta*, and, if what he said is to be construed as holding that the mortgagee must apply the insurance money as fast as the mortgage debt falls due, then he did not state the law as it is now understood in Massachusetts.

Sterling Fire Ins. Co. v. Beffrey, supra, was a foreclosure proceeding by the insurance company, to whom the mortgage had been assigned by the mortgagee, under a stipulation in the policy that he should do so upon payment to him of the amount due on his debt. The assignment was made after the buildings were destroyed by fire. The Court held, that, under the terms of this mortgage and the policy and in the circumstances of that case, the mortgagor could not compel the application of the insurance money. All that there is in the case to support the statement in the "Cyc." is what is said outside of the question raised and determined.

In *McDowell v. Morath, supra*, the case showed, that the plaintiff gave the defendant a writing, in legal effect held to be a mortgage, securing a loan upon real property, conditioned to keep the buildings upon said real estate insured for the benefit of the defendant. Upon the expiration of the policy which the plaintiff first took out, and after his failure to re-insure and keep the buildings on the mortgaged premises insured according to contract, the defendant caused them to be insured at the expense of the plaintiff, by a policy limiting the

company's liability to the plaintiff's indebtedness to the defendant. Upon the buildings being burned the defendant settled with the company for the sum due on his debt against the plaintiff. Held that the plaintiff could not recover the balance of the policy above the sum received by the defendant in the settlement as he had settled for as much as either could recover. The decision in that case was controlled by the terms of the policy, and what was said about the application of insurance money was not called for by any question raised in the case.

In *Smith v. Packard, supra*, one standing in the place of the mortgagee received on the insurance policy more than enough to pay the mortgage debt and interest. It was held that he was liable for the excess above the sum due on his debt. In this case presumably the debt was due, and being due, the mortgagor, or one standing in his place, had a right to pay the debt and have the mortgage discharged. A part of the mortgaged property then being in cash, it would be useless and therefore unnecessary for the person redeeming the entire property, to redeem that money with other money. This case, in its peculiar circumstances, supports the author's statement; but it does not support the doctrine, as it seems to me, that the mortgagee receiving such money before any part of his debt is due, must hold it, unless the mortgagor consents, and apply it as the debt falls due. The redemption of the mortgaged property by payment of the whole debt when due produces an entirely different result from a redemption after default to pay part of the debt when due, leaving a part not then due and still unpaid. In the former case the mortgagee's title is extinguished, while in the latter it remains unaffected. In the former the mortgagee is compelled to re-

linquish all right by a discharge of his mortgage, while in the latter he cannot be compelled to take a portion of the property either as security or payment. Jones on Mortgages, 2nd ed., sec. 707. In the former case the mortgagee cannot decline to take the insurance money as a payment on the ground that it will impair his security, while in the latter he can.

The next and last citation by the "Cyc." is Vol. 28 Cent. Dig., sec. 1447. That authority cites all the cases cited in the "Cyc.," and in addition it cites under the head of "Application of Proceeds of Insurance to Debt," *Conn. Mut. Life Ins. Co. v. Scammon, et al.*, C. C. 4 Fed. 263, and *Ulster County Sav. Inst. v. Decker*, 11 Hun. 515. The latter case was overruled by *Same v. Leach*, 73 N. Y. App. 161, and requires no further comment.

In the case of *Conn. Mut. Life Ins. Co. v. Scammon, supra*, the facts disclosed, that the mortgage was conditioned that the defendant would keep the buildings thereafter erected on the mortgaged premises, insured and would assign and deliver the policy to the plaintiffs, who should hold it as collateral security with the right to collect and apply the money to the restoration of the buildings destroyed. The buildings were burned, the money paid to the plaintiffs and by them handed over to one of the mortgagors to restore the buildings, who failed to do so and who converted the money to his own use. Upon suit being brought to recover the debt, it was held, that as to the other two defendants, the receipt of the insurance money by the plaintiffs must be held to be a payment. Clearly this case does not lay down a rule regulating the general application of insurance money by the mortgagee. It is therein simply held, that not having applied it as pro-

vided in the mortgage, the mortgagees must account for it as a payment.

Hilliard on Real Property, 3rd ed., Vol. 1, p. 260, lays the rule down as follows: "If the debt has not been paid, the money goes to pay it *pro tanto*, and is therefore so applied to the mortgagor's benefit." The only authority cited in support of this statement is *King v. State Ins. Co.*, *supra*, already commented upon.

In Jones on Mortgages, 2nd ed., Vol. 1, sec. 409, it is stated: "The mortgagee receives the proceeds to apply in the first place to the payment of the mortgage debt, and then he is trustee for the mortgagor for any balance left in his hands." The author cites in support of this statement, *Fowley v. Palmer*, 5 Gray 549. In that case, the only question raised was whether the mortgagee was entitled to an allowance for premiums paid and expense of insurance of the mortgaged property, upon failure of the mortgagor to do so, as stipulated in the condition of the mortgage. It was held that he was entitled to have the same allowed on the accounting in that case, which was a proceeding to redeem. What the learned judge said by way of argument in that case was without consideration of the subject of the application of insurance money received by a mortgagee and no authorities are cited by him in support of what he says and it was not called for by any question raised in the case.

In Washburne on Real Property, 3rd ed. Vol. 2, p. 216, the statement is made as follows: "And when the mortgagee is trustee for the mortgagor in respect to the insurance upon the premises, as where the mortgagor effects the insurance payable to the mortgagee, or the mortgagee effects it at the

mortgagor's expense and by his consent, whatever is received by the mortgagee thereon must be accounted for towards the mortgage debt." To this statement the author cites *King v. State Ins. Co.*, *supra*; *Fowley v. Palmer*, *supra*; *Graves v. Hampden Ins. Co.*, 10 Allen, 281, cited as 382.

No further comment need be made respecting *Fowley v. Palmer*, *supra* and *King v. State Ins. Co.*, *supra*, as it has clearly been shown by what has already been said, that neither are authority for holding that the mortgagee *must* hold the money until some part of the debt is due and then apply it as fast as it does fall due.

In *Graves v. Hampden Ins. Co.*, *supra*, which was a proceeding to redeem, the only question settled was as to the rights of the purchaser of the equity where the purchase was made after the insured buildings were burned, the owner of the equity, in pursuance of a provision in the mortgage, having taken out a policy upon the buildings on the mortgaged property, at his own expense, payable to the mortgagee, in which it was provided that no sale of the property should affect the rights of the mortgagee, but change in the title should determine the risk, and having sold his equity after the buildings had been burned and the policy being assigned to the insurance company by the mortgagee, upon the company paying to him the sum due on his mortgage, held that the purchaser of the equity might redeem the premises upon paying to the insurance company the balance due upon the mortgage after deducting the sum due on the insurance.

In *Hopkins on Real Property* on p. 8 the author states as follows on p. 198, viz: "In case of a loss under such a policy, the mortgagee must apply the insurance money to the mortgage debt, if it be due." He bases this statement on the cases

of *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606, (Am. Rep. Vol. 6, 146) and *Waring v. Loder*, 53 N. Y. 581.

All that is held in *Waring v. Indemnity Fire Ins. Co.*, *supra*, is, that the insured may sustain an action against an insurance company for a loss by fire, notwithstanding that he has sold the property and received pay, but still holds the possession of the property, where the policy was issued to insure property "sold but not removed."

In *Waring v. Loder*, *supra*, all that the Court decided was, that though the mortgage, or a judgment of foreclosure founded thereon, should be actually assigned to the insurer, it would not avail him, except so far as it was unpaid by the insurance. It is true that the Court say, that such money should be applied to the payment of the mortgage debt, but the statement is general and without limitation and was never intended as the announcement of a general rule to be applied in all cases, where insurance money was received by the mortgagee on a policy effected for his benefit without a contract express or implied as to how it should be applied. A statement similar to that used in the text books and cases to which attention has been called, can be found in a case in this State, *Brighton v. Doyle*, 64 Vt. 616, 25 Atl. 694, in which Judge Munson wrote the opinion wherein he says: "In collecting the insurance money he received it on the indebtedness for which the property was mortgaged, and it should have been so applied." This statement separated from the facts in the cases might lead one to the conclusion, that it was made as the declaration of a general principle governing the application of insurance money received by a mortgagee, where no contract for its application existed between the mortgagor and mortgagee. The most casual examination of the case shows

that it was not so made. No question was raised but that it was received as a payment with the consent of both parties, but the real issue made was whether it could be applied to any other than the mortgage debt, and the Court in the language above, held that it could not.

A few other minor cases of a similar nature, I have no doubt, can be found, in which the Court have said in a general way, that such insurance money must be applied to the mortgage debt. As has already been shown, and as I believe might be shown in any case which may exist and to which attention has not been called, the general statement, that such insurance money should be applied to the mortgage debt, has been made by way of argument or as called forth by the peculiar circumstances and facts of the case in which they were made; and were not made by the Court in any of them as the statement of a general rule governing the application of insurance money received by the mortgagee, where no contract for its application existed.

In certain circumstances the mortgagee does receive it to apply on the mortgage indebtedness; as where the debt is wholly due and the insurance money is enough to pay it, or as where the mortgagor tenders to the mortgagee a sum which with the insurance money is sufficient to pay the mortgage debt; or as where the money is received by a mortgagee having a debt against the mortgagor other than the mortgage debt, as a payment with the consent of the mortgagor, without direction as to its application, or as it is received in other circumstances of a similar character, unnecessary to enumerate here; but does he ever receive it before the debt is due, to hold and apply it as it falls due and no faster, where no agreement to that effect exists, is the question.

In answering this last question upon principle, the rule, that the mortgagee cannot apply the insurance money to the payment of the mortgage debt, without the consent of the mortgagor, and that the insurance is not effected for the purpose of paying the debt, firmly established by repeated decisions of eminent courts, sheds much light upon the solution of that question. The reason why the mortgagee cannot apply it without the consent of the mortgagor, is because it is not a payment and never was intended to be such by the parties to the mortgage, and the mortgagee's right to it rests upon the mortgage agreement. The money takes the place of the mortgaged property destroyed. *Powers v. Ins. Co.*, 69 Vt. 494, 38 Atl. 148; *Gordon v. Ware Saw. Bank*, 115 Mass. 591; *Naquin v. Texas Saw. & R. E. Invest. Association*, 58 L. R. A. 711; *Williams v. Lilley*, 67 Conn. 50, (37 L. R. A. 150.) Like the mortgaged property which it represents, it may be converted by the mortgagee, if he sees fit so to do, upon breach of the condition of the mortgage; but he cannot be compelled to convert it, and if he does not do so, its character remains as mortgage security, and from that it cannot be changed to the injury of the mortgagee by the mortgagor's neglect to perform the condition of his mortgage contract; for it would be inequitable to permit him to profit by his own wrong.

In considering the rights of mortgagor and mortgagee to the insurance money received on a policy effected by the mortgagor for the benefit of the mortgagee under a condition in the mortgage that he should do so, where such money is received before any part of the debt is due, a distinction is to be carefully observed between their rights to money so received and money received upon a policy assigned to the mortgagee by the mortgagor, covering other property than the mort-

gaged property and assigned to him as independent security. In the former case the insurance policy adds nothing to the security and it becomes valuable only when the mortgaged property which it covers, ceases to exist in whole or in part; while in the latter case the policy represents a value independent of any other security, and in law it is a pledge. In the former case, the money is held under a contract of mortgage, as we have seen. In the latter case the money is held under the contract of pledge. Our own Court has settled the character of money received under a policy issued upon the mortgaged property on the application of the mortgagor, for the benefit of the mortgagee, in *Bank v. Bedell et al.*, 74 Vt. 108, 52 Atl. 270, in which Judge Start, delivering the opinion for the Court, says: "The mortgagee did not hold the property as a pledge or as collateral security," and then further along he says: "The petitioner's custody of the policy did not add anything to its security." Again in *Powers v. Ins. Co.*, 69 Vt. 494, 38 Atl. 148, Taft, C. J., says: "The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property." The principle upon which money received by a mortgagee on a policy of insurance effected by the mortgagor for the benefit of the mortgagee is similar to the principle upon which the mortgagee receives money assessed as land damages for laying a highway across the mortgaged premises. Taft, C. J., delivering the opinion in *Brooks et al v. Hubbard et al.*, 73 Vt. 122, 50 Atl. 802, says: "The mortgagee would hold the damages as security for the mortgage debt in the same manner that it held the land."

Holding money received on an insurance policy in place of the mortgaged property destroyed, is the exercise of a right

by the mortgagee derived from the terms of the mortgage, and his right to that money in no way differs from the right which he had in the property which that money represents, except that, being changed to personal property, possession, in some cases, is necessary in order to protect his right as against third parties; but when a breach of the condition of the mortgage happens, in law, he becomes the absolute owner of the undestroyed part of the mortgaged property and also of the money which represents the part destroyed. He becomes such owner not because the money and property are received as a payment, but because by the terms of the mortgage contract he is to become such on failure of the mortgagor to pay the mortgage debt when due. The parties, no doubt, can agree that the money so received may be applied as a payment, as is usually done, either by express or implied agreement, and when it is so applied, it operates like any payment, to extinguish the debt to the extent of the money received. Usually the application of the insurance money can be made when received with benefit to both parties, as where the remaining security is ample and where the mortgagor does not desire to use the money to restore the property destroyed; but where the remaining security is not ample or where the mortgagor desires to use the money to rebuild, great injustice may be done either to the mortgagor or mortgagee by applying the insurance money to the mortgage debt as fast as it falls due. In such a case where the debt equals the value of the mortgaged property, and, to accommodate the mortgagor, the debt is strung out in small annual payments, the first falling due several years after the debt is created, as in the case at bar, and where the insurance money represents a considerable part of the security, such application is grossly in-

equitable to the mortgagee, as much so as if the mortgagor, whose property had been mortgaged for its full value, had cut the standing timber on the mortgaged premises and sold the same to pay the accruing interest. In either case, the mortgagor would retain the possession and use of the mortgaged property, without paying anything from his own funds, by converting a part of the mortgaged property to his own use; and when the money so received and procured had been exhausted, the mortgagee would have his principal debt outstanding, secured only by a remnant of the original mortgaged property. To carry the illustration to a point where the principal part of the security can be wiped out by the application of the insurance money to the payment of the interest, we have only to suppose a case where the security consists almost wholly of the insured property, and the mortgage debt consists of a series of notes made payable a long time in the future, none of them falling due for years. The accruing interest may consume the money received before any part of the notes falls due. This may be a strong presumption and the case supposed one that is rarely, if ever liable to occur, but the principle is the same as in a less extreme case. The only difference lies in the extent of the wrong done. The extreme case, however, serves to bring out more clearly the inequitable result which in some cases would follow the doctrine that the insurance money must be applied by the mortgagee as fast as the debt fell due. It was argued, that to thus apply insurance money, does not impair the security; but the contention cannot be sustained; for the right to enforce a debt enters into all securities and forms a part of them, and this is observable in the case at bar.

If the orator in the case at bar must apply the insurance money to the interest which is now due, then there is no breach of the mortgage and his foreclosure must fail, and the mortgagor may continue in the possession of the premises until that money is exhausted, hence he cannot enforce his debt against the security until that event happens; whereas, if the money remained security in place of the property burned, then there would be a breach of the condition of the mortgage and the orator would have the right to the possession of the remaining original security as well as the possession of the money.

On the part of the mortgagor, cases might arise in which the rule, that the mortgagee must hold the money until some part of the debt falls due and then apply it as fast as it thereafter becomes due, would be followed by results as serious to the mortgagor as in other cases it was to the mortgagee. His entire property might be embraced in the property burned and the use of the insurance money might be necessary to restore it, and his ability to continue in business might depend upon its restoration. The doctrine then, that the mortgagee must hold the insurance money until some part of the debt falls due and then apply it as fast as it does fall due, will operate, in some cases, unjustly to the mortgagee, and in others unjustly to the mortgagor.

Equity requires that justice should be done in all cases, if possible. Adopting the rule laid down in *Powers v. Ins. Co.*, *supra*; *Sav. Bank v. Bedell et al.*, *supra*; *Gordon v. Ware Sav. Bank*, 115 Mass. 591; *Naquin v. Texas Sav. & R. E. Invest. Association*, *supra*; *Fergus v. Wilmarth*, 117 Ill., 547 and *Williams v. Lilley*, *supra*, which is that the insurance money received by the mortgagee takes the place of the mort-

gaged property, equal justice would be done to both parties in all circumstances. The mortgagee would receive it, if the debt was due and unpaid, as he would receive the mortgaged property which it represented, to reasonably account for its use, and if no part of the debt was due he would hold it in the same manner, unless he or the mortgagor saw fit to use it for the restoration of the property burned. Such an application is sanctioned in *Fergus v. Wilmarth, supra*. In that case the insurance money was received before any part of the debt fell due and was placed in bank to await a proper application. The creditor demanded the payment of the money upon his debt which was not due. The mortgagor insisted upon building another house upon the ground. The bank refused to turn it over to the mortgagor, but agreed to pay it to him whenever he should complete the building, so that sufficient insurance could be had upon it to indemnify the mortgagee as fully as he was indemnified before the fire. It was held by the Supreme Court of Illinois that the money was properly set apart for a legitimate purpose by which the rights of both parties were equally protected.

In *Gordon v. Ware Sav. Bank, supra*, a case cited and approved of in *Fergus v. Wilmarth, supra*, the Court held that the mortgagee could appropriate the money to the restoration of the property destroyed and in connection therewith used the following language: "The insurance was for indemnity to the mortgagor as well as to the mortgagee. To the mortgagee it was protection of the security, not for payment of the debt. It was collateral to the debt. Money received from insurance took the place of the property destroyed, and was still collateral until applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt and upon default of payment to convert the securities."

In *Naquin v. Tex. Saw. & R. E. Invest. Association*, *supra*, in which *Gordon v. Ware Saw. Bank*, *supra*, is cited approvingly, the Court held, that the conditional vendor could apply insurance money, received upon a policy effected by the conditional vendee for his benefit, to the restoration of the property destroyed and in connection therewith the Court says: "The debt not being due, the money collected upon the insurance policy could not be applied to its liquidation, except by the consent of the creditor and the debtor. The debtor had no more right to demand the application of the money to the satisfaction of those instalments which had not fallen due, without the consent of the payee of the obligation, than the payee had to apply it to the satisfaction of the unmatured indebtedness against the wishes of the mortgagor. The rights of the parties were reciprocal under the contract. In this situation, the purpose of the parties, in creating the insurance out of which this fund arose, was attained by a restoration of the house, thereby placing them in the same situation they were in before the fire."

The three cases last above cited show, that the ground of the Court in holding that the mortgagor or mortgagee has the reciprocal right to apply insurance money, received on a policy effected by the mortgagor for the benefit of the mortgagee, rests upon the doctrine that such insurance money takes the place of the property destroyed.

If we admit that insurance money, received by the mortgagee, before any breach of the mortgage, under a policy effected by the mortgagor, for the benefit of the mortgagee, represents the mortgaged property, the conclusion, that the mortgagor or mortgagee may use it to restore the original value of the mortgaged property, is irresistible; for, if no part of the debt

is due, the mortgagor has a right to the use and possession of the mortgaged property, if the mortgage contains no provision to the contrary, so long as he uses it in a manner which in no way endangers or impairs the mortgage security and the mortgagee under similar conditions, has the same right to restore the buildings, because, as is said in *Naquin v. Tex. Sav. & R. E. Invest. Association, supra*, "The purpose of the parties in creating the insurance, out of which this fund arose, was attained by a restoration of the house."

As it seems to me, not only in principle but upon authority, insurance money received in the manner just described represents the property destroyed. This Court in express language has so held, in *Powers v. Ins. Co., supra*, wherein Taft, C. J., says: "The effect of the provision is to give a mortgagee a lien upon the insurance money in case of loss, securing him by substituting the proceeds of the policy in place of the property."

This Court in *Brooks et al. v. Hubbard et al., supra*, have held in express language, that the mortgagee receives damages for land taken for highway purposes in place of the land. The language used by Taft, C. J., is as follows: "The mortgagee would hold the damages as security for the mortgage debt in the same manner that it held the land."

In *Sav. Bank v. Bedell et al., supra*, the Court by Judge Start substantially holds the same. It says: "The mortgagee did not hold the policy as a pledge or as collateral security." If not held as a pledge or collateral security, it must have been held as a mortgage and the Court in this case evidently intended to follow its preceding holdings.

Outside of this State, I have already called attention to *Fergus v. Wilmarth, supra*; *Gordon v. Ware Sav. Bank, supra*,

and *Naquin v. Tex. Sav. & R. E. Invest. Association, supra*, which hold that the insurance money represents the property destroyed. The case of *Williams v. Lilley, supra*, holds the same in the following language: "What would be the rights of the parties in such a case? The money was derived from an insurance of the defendant's interest in the property. It belonged to him. But so did the property insured. Indeed the money itself was theirs, because it represented in another form,—stood for, and took the place of,—what had been theirs; what so far as it remained, continued to be theirs."

Jones on Mortgages 2nd ed., Vol. 1, sec. 410, practically holds the same and Wood on Fire Insurance, sec. 110, p. 236, substantially supports the same. It must be upon this principle that it is said, in Jones on Mortgages, 6th ed. Vol. 1, §409: "If the holder of the mortgage receive the insurance money after the mortgage debt is due, and afterwards, without endorsing the amount received upon the mortgage note, assigns the note and mortgage, the mortgagor cannot maintain a bill to have this amount endorsed upon the note. His remedy is to redeem."

Upon a careful search, I am unable to find any authorities holding the contrary; hence it seems to me that upon principle and authority such money represents the property destroyed by fire and is held under the mortgage as a part of the mortgaged property, and being so held it does not change its character by instalments, as the debt falls due, from mortgaged property to partial payments, and consequently, the mortgagee is not bound to so apply it.

I am unable to agree with the majority of the Court, that such money should be applied as money received on a

pledge; because, very different rights and duties exist under mortgages and pledges. The general property is in the pledgor, while only a special property is in the mortgagor and the pledgee has only a special property, while the mortgagee has the general property in the mortgaged chattel or estate. The mortgagee has absolute title to the property upon the failure of the mortgagor to pay the debt when the same falls due, subject only to the mortgagor's right to redeem; but the pledgee has only the right to take his pay out of the pledge, upon the failure of the pledgor to pay the debt which the pledge secures, leaving the balance, if any, the property of the pledgor.

The distinction between a pledge and a mortgage has been well defined in the following cases: *Wood v. Dudley*, 8 Vt. 430; *Conner v. Carpenter*, 28 Vt. 237; *Gifford v. Ford*, 5 Vt. 532; *Sampson v. Rouse*, 72 Vt. 422, 48 Atl. 666; *Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 59 Atl. 197. Very obvious reasons exist why money received by the pledgee should be applied as a payment to the debt which it secures that does not exist where money is received by the mortgagee from the impairment or destruction of a part of the mortgaged property. In the former case the contract of pledge is that the pledgee may take his pay out of the pledge if the pledgor fails to pay as agreed. It is put into the pledgee's hands for that very purpose; while in the latter case, the contract of mortgage is, that the mortgaged property is to become the property of the mortgagee upon failure of the mortgagor to pay as agreed, subject only to the mortgagor's equity to redeem. The mortgagee may, however, treat it as a payment of any part of the debt which is due, but is not obliged to do so, as has already been shown. Money received

on a pledge, is a payment from the date of its receipt, though the creditor may not be compelled to apply it to any part of the debt until it falls due; but money received from the impairment or destruction of mortgaged property, as is shown above represents the property destroyed. It is such by reason of the mortgage contract and cannot be changed to a payment when a part of the debt falls due without a change of the contract by which it is received by the mortgagee.

All the authorities relied upon by the majority were suits in which the questions involved related to the application of money received on pledges. As it seems to me there is no analogy between the cases cited in support of the majority opinion and the case at bar, and that that opinion stands unsupported by principle or authority.

Because of the views herein expressed I would affirm the decree below; as I believe it is equitable to both parties and is a fair and reasonable result of a natural construction of the mortgage contract, and is supported by principle and the weight of authority.

PROBATE COURT, FOR THE BENEFIT OF ANNA G. SAWYER v.
JAMES C. ENRIGHT.

October Term, 1906.

Present: TYLER, MUNSON, WATSON, HASELTON, and POWERS, JJ.

Opinion filed January 10, 1907.

*Action On Administrator's Bond—Release—Fraud—Issue
Limited By Pleadings—Consideration—Immaterial Find-
ing—Evidence.*

In an action against the surety on an administrator's bond for the failure of the administrator to pay plaintiff's distributive share of the estate, the plea was that, by a release under seal, plaintiff discharged defendant from that liability. The replication was that the release was without consideration, and that by misrepresentations as to its import, defendant's agent induced plaintiff, who was an ignorant woman, to sign the release. *Held*, that the findings that no actual misrepresentation was made; that plaintiff is a person of little education and limited intelligence; that the paper was read to her, but without any explanation of its import, and she signed it believing that it was in the nature of a receipt for a payment to be afterwards made, and that "to this extent" there was passive fraud; do not amount to a finding of actual fraud, in the absence of any finding that either defendant or his agent understood, or ought to have understood, that plaintiff was lacking in intelligence, or was ignorant of the purport of the document.

The finding that no consideration was paid plaintiff does not fully negative a consideration, for there may have been a consideration other than a payment to plaintiff.

The seal upon the release imports a consideration, and the finding to the contrary cannot be considered.

A case is to be tried and determined upon the issue joined by the parties, and evidence is to be received and applied as it bears upon that issue.

The allegation of the plea, that the release was for a valuable consideration, is immaterial; and the contrary allegation in the replica-

tion goes only to support the charge of fraud; so the fraudulent procurement of the release is the only issue made by the pleadings, and the finding that there was no consideration for the release is immaterial.

Defendant cannot be said to have consented to an enlargement of the issue, by failing to object and except to the evidence received on the question of consideration, for evidence that there was no consideration was admissible on the question of fraud.

DEBT on an administrator's bond. Plea, a release under seal. Replication, that the release was procured by fraud. Trial by court at the December Term, 1905, Windsor County, Miles, J., presiding. Judgment for the plaintiff. The defendant excepted. The opinion states the case.

J. C. Enright for the defendant.

Davis & Davis for the plaintiff.

MUNSON, J. The prosecutrix was entitled to a distributive share in the estate of her father, Lemuel A. Giles. Her brother, William H. Giles, now deceased, was the administrator. Defendant was a surety on the administrator's bond. The suit is upon this bond, and the breach declared upon is the administrator's failure to pay the plaintiff her share. The plea is that the plaintiff by her deed duly signed, sealed and delivered, for a valuable consideration, released and discharged the defendant from this liability. The replication is that the release was obtained by the fraud of the defendant and his agent, and without any valuable consideration therefor, "that is to say" that the plaintiff was an unlearned and ignorant woman, unacquainted with legal documents, terms and phrases, and that she was induced to sign the release, when ignorant of the contents of the paper, by

misrepresentations regarding its purport, and without reading it or hearing it read.

The release was procured by defendant's agent. It appears that the paper was read to the plaintiff, but without any explanation of its purport, that "no actual misrepresentation was made," but that the plaintiff is a person of little education and limited intelligence, and that she signed the paper believing that it was something in the nature of a receipt, covering a payment to be afterwards made. It is found that "to this extent" there was passive fraud. There is no finding that the defendant or his agent understood, or ought to have understood, that the plaintiff was lacking in intelligence or ignorant of the purport of the document. The facts reported come short of a finding of fraud.

There is a further finding that no consideration was ever paid to the plaintiff. This does not fully negative a consideration, for there may have been a consideration other than any kind of payment to the plaintiff. But conceding that the finding should receive a broader construction, the pleadings must be considered in determining the effect to be given it. It is clear that the defendant's allegation of a valuable consideration is immaterial, and that the plaintiff's allegation to the contrary goes only to support the charge of fraud. So the fraudulent procurement of the release is the only issue presented by the pleadings. The defendant cannot be said to have consented to an enlargement of the issue by failing to object and except to the evidence received, for evidence that there was no consideration was admissible on the question of fraud. So the finding that there was no consideration is outside the pleadings, and the defendant has not lost his right to object to it. A case is to be tried and determined upon the issue joined

by the parties, and evidence is to be received and applied only as it bears upon that issue. *Walker v. Hitchcock*, 19 Vt. 634; *Poole v. Mass. Mutual Accident Asso.*, 75 Vt. 85, 53 Atl. 331. The seal upon the release imports a consideration, and the finding to the contrary cannot be considered. So the case stands solely on the question of fraud, and the plaintiff having failed to sustain her replication, the defendant is entitled to judgment on his plea.

Judgment reversed and judgment for defendant.

CHARLES H. DAVENPORT v. GEORGE E. CROWELL, ET AL.

October Term, 1906.

Present: MUNSON, WATSON, HASELTON, POWERS, and MILES, JJ.

Opinion filed January 10, 1907.

Corporations—Acts Ultra Vires—Loss by Accommodation Paper—Responsibility of Officers—Suit in Equity by Stockholder—Estoppel—Acquiescence in General Practice—Master's Report—Construction—Inferences Therefrom by Court of Chancery—Presumption on Appeal—Simple Contracts—Rescission—Evidence—Circumstances—Conduct of Parties.

A court of chancery may infer such facts from those reported by a special master, appointed to hear a case in equity on the evidence and report the facts, as necessarily or fairly result therefrom; and on appeal, the Supreme Court will presume that the court of

chancery made such inferences, if that is necessary in order to sustain the decree below.

In a suit in chancery brought by a stockholder of a corporation to compel its president to indemnify the corporation for loss sustained by it in consequence of having been compelled to pay certain of its notes which it had, for accommodation merely, *ultra vires*, and with said president's consent, exchanged with another corporation, that had since failed, for the latter's notes of the same amount, certain facts reported by the master examined, and *held* that the court of chancery might well infer therefrom that, at the time his corporation adopted the practice of exchanging paper for accommodation to meet a deficiency in its funds, the orator had full knowledge thereof and acquiesced therein; and that, to sustain the decree below, this Court will presume that inference to have been there made.

Since the transactions complained of were but specific instances of a general practice adopted by his corporation with the orator's full knowledge and assent, he is bound thereby, regardless of whether he in fact knew, or "ought to have known," of said transactions at the time they were made.

In such case, the burden is on the orator to show the withdrawal of his assent or acquiescence before the performance of the acts with the consequences of which he seeks to charge an officer or agent of the corporation who participated therein.

Stockholders cannot lie by sanctioning, or by their silence acquiescing in, a practice that is *ultra vires* of the corporation to which they belong, watching the result; if it be favorable, to insist on its validity; but if it prove disastrous, to institute an action against the corporation's officer or agent who, in the performance of his duties, participated in the acts done pursuant to such practice, for the loss or damage resulting therefrom.

In a suit in chancery brought by a stockholder of a corporation to compel its president to indemnify the corporation for loss sustained by it in consequence of having been compelled to pay certain of its notes which it had, for accommodation merely, *ultra vires*, and with the president's consent, exchanged with another corporation, that had since failed, for the latter's notes of the same amount, the findings of the master examined, and *held* that a fair construction thereof does not warrant the orator's contention that said accommodation was extended, in the major part, for the sole

benefit of said president and another defendant; but that it rather appears that the orator's corporation indirectly had the whole benefit, and that the facts found do not present a case where the law will infer fraud from the relationship of the parties or the circumstances by which they were surrounded.

A simple contract may, before breach, be rescinded by the mutual consent of the parties thereto; and the agreement to rescind may be inferred from such circumstances, or from such a course of conduct, as clearly indicates that the parties so intended.

As the master's report shows that the orator and defendant, instead of carrying out the provisions of a certain unsealed written agreement between them, conducted themselves in a manner inconsistent with that purpose by making such material changes in the subject-matter thereof that the contract could not be fulfilled in some of its essential features, this Court will presume, in order to sustain the decree below, that the court of chancery inferred from the facts reported, as it well might, that said agreement was, before breach, rescinded by the mutual consent of the parties thereto.

APPEAL IN CHANCERY, Windham County. Heard at Chambers, June 4, 1906, on the pleadings, master's report and the orator's motion for a receiver. *Rowell*, Chancellor. Decree, that the bill be dismissed with costs to the defendants. The orator appealed.

Besides what is stated in the opinion, the master reported that in 1888, soon after the Rand Avery Company had failed, defendant Crowell came to orator's office and in substance informed orator of said failure; told him that the E. P. Carpenter Company would lose something, but not very much, thereby, and that he, Crowell, would put in money himself to take up the Rand Avery Company "swap notes" as they become due, and if there was any loss he would make it good; that on divers occasions thereafter, down to 1892, similar talk was had between orator and defendant Crowell, and orator claimed in that connection that it was understood

between himself and Crowell that Crowell should make good the Rand Avery loss only to the extent which orator should say was right considering the circumstances, which talk on the part of Crowell the orator claimed created a contract and agreement with him for the benefit of the E. P. Carpenter Company and of himself to reimburse the E. P. Carpenter Company for any loss accruing to it out of said Rand Avery note-swapping transactions. Defendant Crowell strenuously denied making any contract or agreement about the matter, but claimed that the substance of the talk between himself and Davenport about the Rand Avery loss in this respect was that no creditor of the E. P. Carpenter Company should lose anything by said swap transactions. The only consideration claimed by orator for this agreement was the statutory liability incurred by Crowell in consenting to these Rand Avery swap transactions, thereby creating an indebtedness of the E. P. Carpenter Company which it was claimed exceeded the statutory amount of indebtedness which said E. P. Carpenter could then contract. The whole Rand Avery indebtedness growing out of these swap transactions was, at the time it was contracted, in excess of the statutory amount of indebtedness permitted by law to said E. P. Carpenter Company, and the said defendant Crowell, then a director, assented thereto. This claimed contract was never reduced to writing, and the defendant Crowell claimed that if one in form had been agreed to, the consideration claimed therefor by the orator was insufficient to support the contract. In 1893, before the commencement of this suit, the E. P. Carpenter Company had practically ceased to exist, and all its property, franchises, and good will had been transferred to a newly organized corporation called the "Carpenter Company," which, with the E. P. Carpenter Company, is a

party defendant to this suit. The existence of the E. P. Carpenter Company, so far as possible, has become merged in the Carpenter Company. The orator neither took any part in, nor consented to this transfer and merger.

The prayer of the bill is: "That your said court restrain said Carpenter Company from issuing to said George E. Crowell, defendant, preferred stock as aforesaid in excess of Twenty Thousand Dollars in amount until he has accounted to the E. P. Carpenter Company for the loss and damage occasioned by the unlawful exchange of the notes and transactions as aforesaid, and that said George E. Crowell, defendant, be restrained from receiving shares of said preferred stock from said Carpenter Company, in excess of twenty thousand dollars in amount, and that he be restrained from in any way disposing of the said preferred shares received from the Carpenter Company, if he has received, beyond twenty thousand in amount until the accounting aforesaid; that said George E. Crowell, defendant, account to the E. P. Carpenter Company for such loss and damage, that said Crowell's claim against the E. P. Carpenter Company be determined, and for such other and further relief as is just."

A. E. Cudworth and H. G. Barber for the orator.

Since the orator is a stockholder in the E. P. Carpenter Company, and that corporation, on request, has refused to take action for its protection, the orator, as such stockholder may maintain this action in his own name. *Lewis v. The St. Albans Iron Steel Works*, 50 Vt. 477; *Hodges v. N. E. Screw Co.*, 1 R. I. 312; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Robinson v. Smith*, 3 Paige (N. Y.) 222.

Judicial authority is practically unanimous that a corporation cannot issue accommodation paper for any purpose except its own business, or in any way lend its credit to another person or corporation, even though consideration be paid therefor. And the power can be upheld only to uphold the rights of third parties who have dealt in good faith, such as are in no way involved here. *Lucas v. White Lime Trans. Co.*, 59 Am. Rep. 449; *Nat. Bank of Republic v. Young*, (N. J.) 7 Atl. 488; *Webster v. Howe Machine Co.* (Conn.) 8 Atl. 482; *Hutchinson v. Sutton Manfg. Co.*, 57 Fed. 998; *Hall v. Auburn Turnpike Co.*, 87 Am. Dec. 75; 10 Cyc. 1109-1115; *In Re Assignment Mutual &c., Ins. Co.*, 70 Am. St. Rep. 164.

Any officer of a corporation participating in such transactions, or assenting thereto, is liable to the corporation for any resulting loss. *Hodges v. New Eng. Screw Co.*, note 53 Am. Dec. 637; *Winchester v. Howard*, 136 Cal. 432; 69 Pac. 77, 89 Am. St. Rep. 153; *Robinson v. Smith* (N. Y.) 3 Paige Ch. 222, 24 Am. Dec. 212; *Bosworth v. Allen*, 168 N. Y. 157, 85 Am. St. Rep. 667.

Acts which are *ultra vires* not only of the directors, but of the corporation, or when prohibited by positive law, are incapable of actual, much less constructive, ratification. *Durkee v. People*, 155 Ill. 354, 46 Am. St. Rep. 340; *Steele v. Fraternal Tribunes*, 215 Ill., 190, 106 Am. St. Rep. 160; *Wheeler v. Home Sav. &c. Bank* (Ill.), 80 Am. St. Rep. 161; *Lyndon Mill Co. v. Lyndon Inst.*, 63 Vt. 581; *Fort Scott Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; Pom. Eq. §964; 10 Cyc. 1070; 17 Am. & Eng. Enc. 164.

In cases of this kind lapse of time is no test of staleness. *O'Brien v. Wheelock*, 184 U. S. 450; *Coles, Admr. v. Ballard*, 78 Va. 139; *Wessels v. Craigs, Admr.*, 80 Va. 22; *Cottrell v. Nat. King*, 89 Va. 901; 12 Am. & Eng. Enc. 534.

E. L. Waterman, and *Clarke C. Fitts* for the defendants.

A breach of the statute by one director furnishes no consideration for a promise by him to pay debts for another, or to make good any loss he or the company may suffer. *King, Receiver v. Cochran*, 76 Vt. 141; *Barton Nat. Bank v. Atkins*, 72 Vt. 33; V. S. 3724.

WATSON, J. The first question presented is whether defendant Crowell is liable to the E. P. Carpenter Company for loss or damage incurred through transactions of exchanging notes with the Rand Avery Company, a corporation of Boston.

The bill is brought by the orator as a stockholder in the former company, and if the case is otherwise made out, no question is made but that, in the circumstances shown, the bill is properly brought by him.

The E. P. Carpenter Company was organized for business in this State in 1884 with a capital stock of twenty-five thousand dollars, divided into shares of the par value of one hundred dollars each. It does not appear who all the stockholders were nor how the stock was paid for, except that E. P. Carpenter, the orator, and defendant Crowell were the principal stockholders, and a considerable part of the stock held by them was paid for by their individual notes to the company. The business of the company was the manufacture of organettes, organs, and later pianos were added. Soon after the company began business Carpenter became a director and the president thereof, the orator a director and the clerk, and Crowell a director and the treasurer. The orator and Crowell continued to be directors for the remainder of the time the company was in business, but the orator ceased being clerk

and Crowell ceased being treasurer early in 1889; thereafter Martin Austin, Jr., was clerk, the orator treasurer, and Crowell president. While Carpenter was president he practically managed the business affairs of the company. His connection with the company, except as stockholder, was severed about the time Crowell was made president, and thereafter the business appears to have been managed by the orator and Crowell in connection with Austin who in this respect was the most active of the three.

In 1888, beginning about the last day of May and ending in October, the company exchanged notes with the Rand Avery Company to the amount of about \$9,000.00. The Rand Avery Company failed in the latter part of that year, as a result of which the E. P. Carpenter Company lost by reason of being compelled to pay the notes thus exchanged approximately eight thousand dollars. It is contended that the notes so given to the Rand Avery Company and the notes received of it in exchange which the E. P. Carpenter Company indorsed, were in their nature and essence accommodation paper; that the accommodation was extended for the benefit of Crowell and Carpenter, in the "major part" at least, on the one side, and of the Rand Avery Company on the other, none of the notes representing any real business transaction; that the E. P. Carpenter Company had no power to become a party to notes for the accommodation of another person or corporation; and that since Crowell participated in or consented to the transactions in question, he is liable for the resulting loss or damage. On the other hand it is contended by the defendants that the orator by reason of his assent or acquiescence is equitably estopped from taking this position.

It is found that almost from the beginning of its business the E. P. Carpenter Company lacked funds necessary for

a "working capital," and to make up for this, it adopted the practice of obtaining accommodation notes from various parties and also of borrowing checks, giving in exchange therefor its own notes or checks; and that this practice continued until 1890 or later. These findings show that the corporation from force of circumstances adopted the practice of exchanging paper for accommodation to make up for a deficiency in its funds with which to do business, as early as in 1884 or 1885,—some three or four years before the transactions with the Rand Avery Company,—and this practice was thence continuous for a period extending two years or more after that company failed. During all this time, as before seen, the orator was a director; and he was the clerk of the corporation until early in the year 1889 when he ceased holding that office and was thereafter the treasurer. In the office of the company, the place where the meetings of the stockholders as well as those of the directors were held, were the company's books kept in due course of business, and among them were books in which were entered outstanding notes and bills, both payable and receivable, showing among other things the dates of issue and of maturity, the maker and payee; though some of the entries respecting the notes received of the Rand Avery Company were not made at the time the notes were received, but were later. The report states that the orator had full and free access to these books, did in fact examine them more or less, and knew or ought to have known of the issuing of the notes in question during the period when they were being issued, and that he had actual knowledge of these notes and of their character immediately after the failure of that company. As far as the case shows, no loss or damage ever resulted from this practice except in connection with the last

named company, and neither regarding the transactions with that company nor regarding those of a similar character had with others were objections ever made by the E. P. Carpenter Company or by any of its stockholders until the bringing of this suit twelve years or more after the practice ceased and more than fourteen years after the transactions were had of which the orator here complains. All of the funds realized from accommodation paper under the practice went to the use of the corporation unless, as the orator claims, it be a portion of the avails of the notes exchanged with the Rand Avery Company, concerning which we will speak presently.

From the facts found by the master in the respects above mentioned, the court below might well have inferred that the orator had full knowledge of the adoption of such practice at the time it took place and acquiesced therein. And to sustain the decree below this Court will presume that such inference was there made. The case of *Burt v. British, Etc. Assur. Ass.*, 4 De G. & J. 158, is much on point showing a similar conclusion of fact based upon very like circumstances.

Under our practice of appointing special masters to hear causes in equity on the evidence and report the facts to the Court (V. S. 936-942), such masters are officers of the Court of Chancery and that court may infer such facts from those reported as necessarily or fairly result therefrom. In this respect, reports of such masters stand like those of auditors, concerning which this rule has long been established. *Kimball v. Estate of Baxter*, 27 Vt. 628; *Pratt v. Page et al.*, 32 Vt. 13.

It is said, however, that knowledge by the orator of the issuing of the notes with the Rand Avery Company is not found by the master, and that the finding that he "ought to

have known" does not reach the situation. How the case might stand in this respect were the transactions with that company alone to be considered it is unnecessary to inquire; for during the continuance of the practice named it was not necessary for a stockholder who had assented thereto or acquiesced therein to have personal knowledge of all the different transactions had under it in order to be bound by it. If he would avoid the effect of the practice the burden is on him to show a subsequent withdrawal of his assent or acquiescence before the performance of the acts with the consequences of which he seeks to charge an officer or agent of the company who participated therein. In *Gregory v. Patchet*, 33 Beav. 595, it is said by Sir John Romilly, Master of the Rolls, "shareholders cannot lie by sanctioning, or by their silence at least acquiescing in an arrangement which is *ultra vires* of the company to which they belong watching the result; if it be favorable and profitable to themselves to abide by it and insist on its validity; but if it proves unfavorable and disastrous, then to institute proceedings to set it aside." Upon the same principle, such stockholders cannot maintain an action against the company's officer or agent who, in the performance of his duties, participated in acts done pursuant to such arrangement, for the loss or damage resulting therefrom. *Holmes et al. v. Willard*, 125 N. Y. 75; *Watts's Appeal*, 78 Pa. St. 370; *McC Campbell v. Fountain Head R. R. Co.*, 111 Tenn. 55, 102 Am. St. Rep. 731; *Alexander v. Searcy*, 81 Ga. 536, 12 Am. St. Rep. 337; *Evans v. Smallcombe*, L. R. [3 Eng. & Ir. App.] 249.

It is further urged that the accommodation was extended in the major part for the benefit of Crowell and Carpenter,—not for that of the company. But we do not think a fair construction of the findings warrants this contention. It is true that

the avails of some of the accommodation notes in controversy were received by Crowell and charged to him in the account kept with him on the books of the E. P. Carpenter Company, and a part of the avails were had by Carpenter, being charged to him in his account kept by the company, and that during the period covered by these transactions with the Rand Avery Company, the aggregate sums thus received by them which probably were of the avails of those notes equalled the major part of them. Yet the record shows that during all the time the E. P. Carpenter Company was in business it was necessary for it to obtain the indorsement of Crowell on its own notes and on some, if not all, of the notes received of its customers, which were discounted at local banks, in fact that there was a tacit understanding that he should, and he did, indorse such commercial paper. All of the same time the company occupied buildings owned by him, for which he was paid or credited rent. As of January 1, 1888, a settlement was made between him and the company, by which the company's indebtedness to him was found to be \$5,191.43, and it gave him therefor its three notes on demand aggregating that sum. The company kept a general account with him and when he received the avails before mentioned they were not applied on his outstanding notes against the company, but were charged to him in the general account and adjusted at their next settlement which was had in February, 1894. It is apparent that the indebtedness from the company to Crowell was constantly and rapidly increasing, for on January 1, 1892, there was due him \$19,607.39,—an increase of over fourteen thousand dollars in four years,—and on January 1, 1903, it had reached the sum of \$42,494.59. At the annual meeting held in January of each year, beginning with the year 1888, there

was submitted to the directors and stockholders a detailed statement of the financial standing of the company, its debts and liabilities being itemized. The orator examined each of these statements, from which he knew or was bound to know, that the company was year by year getting more and more in debt to Crowell, yet he neither protested against nor objected to the correctness of any of the statements, and their correctness appeared to be upheld by the books of the company. These facts seem to show beyond question that not only were the accommodation notes for the benefit of the company in the prosecution of its business, and that it in fact so had the benefit of them, but that such was the understanding of the directors including the orator at the time the transactions took place. There is no finding that Crowell either alone or in connection with any other officer or agent of the company, did anything in respect to these notes, or the avails thereof, which was not in good faith to the company in the performance of his duties as its officer or agent, nor do the facts found present a case where the law will infer fraud from the relationship of the parties or the circumstances by which they were surrounded. Manifestly the avails received by Crowell, as before stated, were treated by the directors as a payment to him on his account with the company, and as such it was acquiesced in and confirmed by them. No reason is shown why a court of equity should not now consider it in the same way.

This brings us to the consideration of the second question presented which is, whether the amount of the notes and accounts specified in paragraph one of the written agreement made by Crowell and the orator under date of January 1, 1892, should in equity be charged to the former in his account on

the books of the E. P. Carpenter Company and deducted from the balance then due him from the company, in accordance with the provisions of that agreement. It was there agreed by the parties (1) that their joint notes, and accounts, due to the company, be thereby made an individual matter between them, and the amount of these items on that day, \$5,375.49, were to be charged to Crowell on the books of the company and deducted from the balance of the sum which was shown by those books to be due him; (2) that the aforesaid notes and accounts were to be made up and balanced, placed in an envelope with the stock against which the notes were given, and with a copy of the agreement kept in the safe of the company in trust for the parties to the agreement as their interests might appear; (3) that the orator held himself liable equally with Crowell for any possible loss on money loaned the company or indorsements of its notes or business paper, and "he gives his notes to said Crowell as collateral security for this agreement, payable to such amount as may appear to be due in such loss on settlement of the affairs of the company, and also from the effect of the credit above agreed on"; and (4) that the agreement should terminate October 1, 1892.

The master states that the only consideration claimed or shown for this agreement other than any mutual promises disclosed by the agreement itself, as far as Crowell is concerned, was his liability to the company and to the orator as stockholder thereof by reason of the loss to the company on the "Rand Avery Company swap notes" before mentioned, and also the forbearance of the orator to enforce such liability against him. It is found that the orator has not attempted to enforce such liability until the bringing of this suit, and the master states that he is unable to find that this forbearance

was asked for or procured by Crowell and submits to the Court the question whether the contract has a sufficient consideration. But whether there was a sufficient consideration to support the agreement or not is immaterial in the disposition we make of the case. Nothing has been done by either party to carry out the provisions of the contract, although there has been talk about it between them on various occasions. The nature of this talk is not shown. It appears that when the agreement was made the parties were liable to the E. P. Carpenter Company on their joint and individual notes as stated in the first paragraph of the contract. The joint note included therein was for \$1,450. This note the company continued to hold the same as before until the year 1901, when it was divided between Crowell and the orator, each giving his note to the company for his share. It further fairly appears that the number of shares of stock in the company to which the orator claims to be entitled legally or equitably is one hundred twenty, and that subsequent to the making of the agreement he pledged sixty-nine of the shares as collateral security to various other persons and institutions and deposited the remaining shares with still another person in trust. This is the condition of the stock at the present time.

Thus it appears that instead of carrying out the provisions of the contract, the parties were conducting themselves in a manner inconsistent with that purpose by making material changes in the condition of the subject-matters thereof, by reason of which the contract could not be carried out by them in some of its most essential features.

In these circumstances this Court will presume that the court below inferred from the facts reported, as it well might,

that the agreement of January 1, 1892, was before breach rescinded by the mutual consent of the parties and thereby rendered without force. This the parties were competent to do (*Blood v. Enos*, 12 Vt. 625, 36 Am. Dec. 363; *Flanders v. Fay*, 40 Vt. 316), and the agreement to rescind may be shown by such circumstances, or by such a course of conduct, as clearly indicates that the intention of the parties was that it should so operate. *Wheeden v. Fisk*, 50 N. H. 125.

It follows that the orator is entitled to no relief under the contract.

Decree affirmed and cause remanded.

ERNEST G. FOSS v. DANIEL P. SMITH.

October Term, 1906.

Present: ROWELL, C. J., TYLER, WATSON, HASELTON, and MILES, JJ.

Opinion filed January 10, 1907.

Assumpsit—Evidence—Value—Photographs—Argument of Counsel—Reversible Error—Appealing to Jury's General Experience—New Trial—Newly Discovered Evidence—Receipt—Cumulative Evidence—Due Diligence.

Where the record does not disclose the ground upon which offered evidence was excluded, and there is any ground to justify the court's action, error does not appear.

In assumpsit on a promissory note, where it became material on the question of payment to show the value of the furniture in a certain hotel about the time the note was given, the exclusion of a seasonably taken and properly verified photograph of the hotel

parlor and the furniture in it does not show error, the ground of the exclusion not appearing; for the photograph could show little or nothing of the kind and quality of the material of which the furniture was made, which were very essential elements of its value; and the amount of evidence on the question of value might have been such that the court thought it not needful to cumulate it further by such slight and uninformative evidence.

In *assumpsit* on a promissory note which, during most of the time before suit, was pledged by plaintiff as collateral, and which defendant claimed he had paid within a few days after it was given, it was proper to allow defendant to testify that he never had notice that his note was held as collateral, as tending to prevent an inference of notice from his silence, which would have made against his testimony that he had forgotten for three years that he had given the note.

In civil cases, considerable latitude is allowed counsel in commenting upon the parties from the evidence. It is when they transgress the evidence that the line is sharply drawn.

In argument to the jury, defendant's counsel, without provocation, incorrectly quoted plaintiff's counsel as having said of plaintiff, in the opening argument, 'Granted that he is a knave,' and added, "and I guess it is generally granted." Whereupon, after objection and exception, he again thus incorrectly quoted plaintiff's counsel and added, "and I don't dispute it." *Held*, not to require reversal; for, though plaintiff's counsel was incorrectly quoted, the jury knew that, and could not be misled by it; and defendant's counsel stated nothing as a fact, but only as a "guess," and as an assent to what he incorrectly represented plaintiff's counsel as having said.

Although there was no evidence on that subject, it was proper for counsel to appeal to the general experience of the jury by arguing that, as a matter of common knowledge, it is easier to copy or simulate handwriting with a lead pencil than with a pen.

On a petition for a new trial on the ground of newly discovered evidence, brought by the plaintiff, who was cast in a suit in *assumpsit* on a promissory note for \$1,750, dated June 15, 1901, it appeared that on the trial defendant claimed that the note had been overpaid by his stock and farming tools which he transferred to plaintiff on June 17, 1901, to apply on the note, in accordance with a hotel-farm trade between the parties, made June 13, 1901, but that he did not then take up the note, and straightway forgot

for three years that he had given it; that it was conceded that said stock and farming tools were transferred to plaintiff, but he claimed that this was on June 14, 1901, the day before the note was given, and to apply on the price of the hotel furniture. *Held* that, in the circumstances, a new trial should be granted because of the discovery in the town clerk's office, a few days after the trial, of a receipt signed by both parties, dated June 17, 1901, and stating that on June 14, 1901, defendant received of plaintiff his pay in full for seven calves, fifteen hogs and pigs, and \$100 on stock, leaving \$180 due defendant, to be applied on a certain note for \$1,750, dated June 15, 1901; it appearing that defendant took no testimony in defence of the petition, and does not dispute that he signed the receipt.

The receipt is not cumulative evidence, for it is a deliberate admission by defendant that the note was not paid as he claims, and no such admission was shown at the trial.

It appearing that, in preparing his case for trial, at the request of his counsel, plaintiff and his wife made diligent search for the receipt among all his papers, but could not find it, and then concluded that he either never had one or had lost it; that it was unexpectedly discovered by the town clerk, after the trial, while searching for other papers at plaintiff's request, plaintiff was not in fault in not having the receipt at the trial, nor in not moving for a continuance because he did not have it.

GENERAL ASSUMPSIT. Pleas, the general issue, payment, and plea in offset. Trial by jury at the December Term, 1905, Lamoille County, *Munson*, J., presiding. Verdict and judgment for the defendant. The plaintiff excepted.

Under his counts in general assumpsit plaintiff sought to recover the amount due on a promissory note for the sum of \$1,750, dated June 15, 1901, payable to the plaintiff or bearer, and signed by defendant. The defendant admitted that he executed said note and that he delivered the same to plaintiff; but defendant claimed, and his evidence tended to show, that he had paid said note by selling to the plaintiff to apply thereon defendant's farming tools, cows, horses, and other stock

and personal property on his farm in Stowe, Vermont, in accordance with one of the stipulations in the hotel-farm trade hereinafter referred to. It appeared that on Thursday, June 13, 1901, at Morrisville, Vermont, plaintiff and defendant entered into a verbal contract, in accordance with which at Morrisville on Saturday, June 15, 1901, the plaintiff and his wife by warranty deed of that date conveyed to defendant the Hotel Lamaille and the real estate connected therewith, situated at said Morrisville, together with all the furniture therein—except \$200 worth of furniture—and defendant executed and delivered to plaintiff said note for \$1,750; it also appeared that on Monday, June 17, 1901, at Stowe, in accordance with the stipulations of said verbal contract, defendant and his wife executed and delivered to plaintiff a warranty deed of defendant's farm, situated in Stowe, together with all the farming tools and machinery, forty-two cows, and a pair of horses and certain other personal property on said farm, and at the same time at Stowe, in accordance with the terms of said verbal contract, plaintiff purchased of defendant, seven calves and fifteen hogs and pigs. A vital question in the trial was: What were the terms of said hotel-farm contract, in accordance with which said property was exchanged? The answer to this question determined whether said note of \$1,750 was still due and wholly unpaid, as plaintiff claimed, or was fully paid, as defendant claimed.

Plaintiff claimed, and his evidence tended to show, that said hotel-farm trade was as follows: Plaintiff was to exchange his said hotel property at Morrisville—the real estate alone without the hotel furniture—for defendant's said farm, in Stowe and \$1,750 to boot, represented by the note in question; that defendant in addition purchased all the plaintiff's

furniture in said hotel—except \$200 worth of furniture—for the sum of \$1,700, and that defendant was to pay this \$1,700 by selling to plaintiff, who agreed to buy at an appraisal to be later made, all of defendant's farming tools and stock; and that if said appraisal came to less than \$1,700, defendant was to pay plaintiff the difference; if said appraisal came to more than \$1,700, plaintiff was to pay defendant the difference. Defendant claimed, and his evidence tended to show, that said hotel-farm trade was as follows: Defendant was to give his said farm—no personal property included—and \$1,750, represented by the note in question, for plaintiff's said hotel property and all the furniture therein, except \$200 worth of furniture, and that plaintiff was to purchase from the defendant all of defendant's farming tools and stock at an appraisal to be made later, which purchase was to be applied in payment of the \$1,750 boot between defendant's farm and plaintiff's hotel and furniture.

It was conceded in said trial that the note in question and said deed of the hotel property and furniture from plaintiff and wife, were each duly executed and delivered at Morrisville on Saturday, June 15, 1901, and that the deed of defendant and his wife, conveying said Stowe farm and personal property to plaintiff was executed at Stowe, June 17, 1901, and was then and there drafted by Mrs. Alice Raymond, the town clerk of the town of Stowe. The evidence of plaintiff tended to show that on Friday, June 14, 1901, he went to defendant's farm in Stowe, there met defendant, and that they then and there agreed upon the value of all of defendant's farming tools and stock; that said appraisal came to more than \$1,700, the agreed price of said hotel furniture; that he paid defendant in full for 7 calves and 15 hogs and pigs, and paid him also the

sum of \$100 on the other stock so appraised, which left a balance of \$180 due defendant on the appraisal after paying for the hotel furniture therewith at \$1,700. The defendant claimed, and his evidence tended to show, that said appraisal of stock and farming tools did take place at his farm in Stowe, but that it took place on Monday, June 17, 1901, in the morning and not on Friday, June 14, 1901. So it became a vital question in the trial of said cause at what date said appraisal of the personal property took place, whether on June 14, 1901, as claimed by the plaintiff, or on June 17, 1901, as claimed by the defendant. Because, if the appraisal took place on June 14, 1901, as claimed by the plaintiff, the personal property would not have been likely to have been used to pay the note of \$1,750, because that note was not executed until Saturday, June 15, 1901, as both parties agreed and as the note itself shows. The defendant claimed, and his evidence tended to show, that the appraisal amounted to about \$2,200, enough to pay the note in question of \$1,750, upon which the defendant's evidence tended to show it was agreed the appraisal should be applied, and left a balance of between \$400 and \$500 due from plaintiff to defendant, for which defendant had never received his pay, and which balance formed a part of defendant's specifications under his plea in offset. It appeared that defendant never demanded the note in question from plaintiff till the summer of 1904. Defendant testified that the reason he had never demanded the note was that he had entirely forgotten that he had ever given the same; that the reason he did not demand said note on June 17, 1901, when he and his wife executed the deed of said Stowe farm to plaintiff, and at which time defendant claimed that it was paid by the appraisal and sale of said personal property, was

that he had then entirely forgotten that he had given the note in question, that he had forgotten that he had given it in a few hours after it was given, and never remembered that he had given it until the summer of 1904, when the person who drafted the note and the deed from plaintiff and wife to defendant on June 15, 1901, refreshed his memory about it, and that then for the first time he remembered that he had given said note.

The plaintiff introduced his wife as a witness, and after showing that she was well acquainted with said hotel and all the furniture therein at the time of said hotel-farm trade, plaintiff produced a photograph of the parlor of said hotel and the furniture therein at the time of said hotel-farm trade, and offered to show by the witness that it was an accurate representation and picture of said parlor and said furniture, showing the character and condition of the same as they existed at the time of said hotel-farm trade. Said offer was excluded, to which the plaintiff excepted. Thereupon the plaintiff offered in evidence said photograph, which offer was excluded, to which plaintiff excepted.

The evidence of defendant tended to show that in June, 1904, he spoke to plaintiff and asked him if it was true that plaintiff held the note in question against him; that plaintiff answered that it was true that he held said note; that thereupon defendant said to plaintiff that said note had been paid with said farming tools and personal property, and that plaintiff then replied that it was true that said note had thus been paid. In reply to this, plaintiff introduced evidence of himself and Mr. Hulburt and Mr. Cheney tending to show that as early as May, 1904, and before this alleged demand in June, 1904, plaintiff had retained said Hulburt and Cheney to bring suit against the defendant upon this note.

Referring to this matter in argument Mr. Redmond said, in substance, that plaintiff would have been a fool to have told the defendant in June, 1904, that said note was paid, when he had then retained counsel to bring suit thereon; that although the other side might claim that plaintiff was a knave they would not claim that he was a fool.

Referring to these remarks of Mr. Redmond, Mr. Senter, counsel for the defendant, in his argument to the jury, under objection and exception of the plaintiff, said: "Mr. Redmond said to you, gentlemen of the jury, 'granted that he, Foss, is a knave' and I guess it is generally granted," immediately after an objection was interposed to this remark of Mr. Senter and exception noted, Mr. Senter continued, under the objection and exception of the plaintiff: "And I repeat, gentlemen," Mr. Redmond says 'granted Ernest Foss is a knave' and I don't dispute it.' "

The plaintiff also brought a petition for a new trial to the Supreme Court for Lamoille County, at the October Term, 1906, under V. S. 1662, on the ground of newly discovered evidence; and the petition was heard with the exceptions on the affidavits thereto attached.

J. W. Redmond, R. W. Hulburd, and Thomas C. Cheney for the plaintiff.

It was error to exclude the photograph. *Lake Erie, Etc. R. Co. v. Wilson*, 189 Ill. 89; *Com. v. Morgan*, 159 Mass. 375; *Wabash R. Co. v. Prast*, 101 Ill. App. 167; *Udderzook v. Com.*, 76 Pa. St. 340; 1 Wig. Ev. §§790, 792; *Marcy v. Parker*, 78 Vt. 73; *Hale v. Rich*, 48 Vt. 217.

The newly discovered evidence is clearly and vitally material, and of such a character as to convince this Court that

injustice has been done the petitioner, and that a new trial will change the result. This test is generally conclusive. *Gilman v. Nichols*, 42 Vt. 313; *Beckwith v. Middlebury*, 20 Vt. 593; *Briggs v. Gleason*, 27 Vt. 116.

The newly discovered evidence is not cumulative. *Bradish v. State*, 35 Vt. 452; *Parker v. Hardy*, 24 Pick. 246; *Golworthy v. Linden*, 75 Wis. 24; *Wilson v. Plank*, 41 Wis. 94; *Walker v. Graves*, 20 Conn. 305; *Guyott v. Butts*, 4 Wend. 579; *German v. Maquoketa Sav. Bank*, 38 Ohio 368; *Bogges v. Read* 83 Iowa 548; *Myers v. Brownell*, 2 Aik. 406; *Leavy v. Roberts*, 8 Wis. 310; *Burr v. Palmer*, 23 Vt. 246; *Barkers v. French*, 18 Vt. 460.

Even if the evidence is cumulative, a new trial will be granted where there is, as here, a strong probability that injustice has been done. *Smith v. Graves*, 74 Wis. 171; *Hart v. Brainer*, 68 Conn. 50; *Keet v. Mason*, 167 Mass. 154; *Volkommer v. Nassau Electric R. Co.*, 23 N. Y. App. 88.

V. A. Bullard, John H. Senter, and F. G. Fleetwood for the defendant.

The court did not err in rejecting the photograph. The use of photographs is largely for explanation, and not to prove value. 1 Greenl. Ev. (16 ed.) 439.

Counsel may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses. 2 Enc. Pl. & Pr. 716; *Guiltinan v. Ins. Co.*, 69 Vt. 469; *Amsden v. Atwood*, 69 Vt. 527.

To warrant a reversal because of the wrongful argument of counsel, it must appear probable that the jury were influenced thereby. *Buscher v. Scully*, 107 Ind. 246, 8 N. E. 37; *Galveston Ry Co. v. Croskell*, 6 Tex. Civ. App. 160, 25

S. W. 486; *West. Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403, 25 S. W. 168; *Tucker v. Cole*, 54 Wis. 539, 11 N. W. 703; *Dorset v. Clother*, 35 Ill. App. 231; *Billings v. Ins. Co.*, 70 Vt. 478; *Morrill v. Palmer*, 68 Vt. 1.

The receipt is but cumulative evidence; it is only evidence of the same kind and quality as that used on the trial, and for that reason a new trial should be denied. *Briggs v. Gleason*, 27 Vt. 114; *Middletown v. Adams*, 13 Vt. 285; *Dodge v. Kendall*, 4 Vt. 31; *Bullock v. Beach*, 3 Vt. 73; *Kirby v. Waterford*, 14 Vt. 414; *Gilman v. Nichols*, 42 Vt. 313; *Waters v. Langdon*, 16 Vt. 570; *Stearns v. Allen*, 18 Vt. 119; *Linsley v. Danville*, 55 Vt. 72.

ROWELL, C. J. The 1750-dollar note in question, dated June 15, 1901, was given by the defendant for boot in a hotel-farm trade between the parties. The defendant claimed it was paid. That depended upon whether he was to have the hotel furniture with the hotel for that amount of boot, as he claimed, and whether the note was to be, and was, paid in his stock and farming tools, as he further claimed; or whether he was not to have the furniture thus, but was to buy it separately at \$1,700, and pay therefor in his stock and farming tools, as the plaintiff claimed.

It appeared that the parties met and agreed upon the price of the stock and tools, but they did not agree when it was. Plaintiff's evidence tended to show that it was on Friday, June 14, the day after the bargain was made, and the day before the note was given; while the defendant's evidence tended to show that it was on Monday, June 17, the day he deeded his farm to the plaintiff. The plaintiff's evidence further tended to show that the price of the stock and the tools was more

than enough to pay the \$1,700 for the furniture, which, by agreement, was paid in full thereout, and that the plaintiff then paid the defendant in cash for seven calves and fifteen hogs and pigs, and \$100 to apply on other stock, leaving a balance of \$180 due the defendant, which, by agreement, was, on July 1, 1901, indorsed on a note the plaintiff held against the defendant for \$1,380, known as the Smith & McCollister livery note. Defendant's evidence tended to show that the \$180 indorsed on that note represented a cash payment by him, and did not represent what the plaintiff claimed it did.

It appeared that during most of the time before suit brought, the plaintiff had the note in question up as collateral, but there was no evidence that the defendant knew it.

As tending to show what the trade was, the plaintiff introduced evidence of the value of the hotel and the furniture and of the farm and the stock and tools at the time of the trade. The plaintiff produced a photograph of the hotel parlor and the furniture in it, taken at the time of the trade, and offered to verify it and put it in evidence, which was denied him, but on what ground does not appear. If there is any ground to justify the court's action, error does not appear, and we think there is a ground; for while the photograph might show the form and fashion of the furniture, and something of its condition, it could show little or nothing of the kind and quality of the material of which it was made, which were very essential elements of its value, and the amount of evidence on the question of value might have been such that the court thought it not needful to cumulate it further by testimony so slight and uninformative as that afforded by the photograph.

The defendant was allowed to testify that he never had notice that his note was held as collateral. The plaintiff

argues that this was error, for that the testimony could have no other tendency than to induce an inference of no pledge from the fact of no notice, which would be *res inter alios*. The exceptions do not show the purpose for which the testimony was received, but it had a tendency to prevent an inference of notice from the defendant's silence, and such an inference would have made against his testimony about having forgotten for three years that he gave the note. For this purpose the testimony was admissible, and is not argued against.

Mr. Bullard's argument to the jury as to the dangerous character of the plaintiff was based upon the testimony, and was not so unwarranted by it as to be error. In civil cases, considerable latitude is allowed counsel in commenting upon the parties from the testimony. It is when they get outside of the testimony that the line is sharply drawn.

Mr. Senter's argument was not provoked by Mr. Redmond's, and he incorrectly stated what Mr. Redmond said; but the jury knew that, and would not be misled by it. Mr. Senter stated nothing as a fact, but only as a guess, and as an assent to what he represented Mr. Redmond as saying. While this was not a style of advocacy to be commended, it was not so vicious as to require reversal. If he had asserted as a fact what he said as a guess, it might have been different.

His argument that as matter of common knowledge it is easier to copy or simulate handwriting with a lead pencil than with a pen, was but appealing to the general experience of the jury as to the comparative facility with which those instruments can be used, a matter concerning which they might well be supposed to have some practical knowledge.

The petition for a new trial is based upon the finding of a receipt in the town clerk's office in Stowe a few days after

the trial, made and dated June 17, 1901, the day the defendant deeded his farm to the plaintiff, and signed by both parties, stating that on June 14, 1901, the defendant received of the plaintiff his pay in full for seven calves, fifteen hogs and pigs, and \$100 on stock, leaving \$180 due the defendant, to be applied on a certain note for \$1,750, dated June 15, 1901.

As already appears, the parties differed widely as to what the trade was, and much testimony was introduced in support of their respective claims, coming largely from witnesses who undertook to reproduce from unaided memory what they claimed to have heard the parties say about it several years before the trial. It became and was material to show when the parties met and agreed upon the price of the defendant's stock and farming tools, whether it was on Friday, June 14, as the plaintiff claimed, or on Monday, June 17, as the defendant claimed, concerning which there was much testimony on both sides; some, mere matter of unaided memory; some, memory refreshed by incident; and some, memory refreshed by memorandum and incident.

The defendant took no testimony in defence of the petition, and does not deny that he signed the receipt, that it was read to him, and left with the town clerk, as she says in her affidavit. This receipt is strongly corroborative of the plaintiff's claim, and amounts to a deliberate admission by the defendant that the stock and tools were appraised on the 14th, and paid for then into \$180 in some way other than by application on the note in question, which is thereby expressly recognized as outstanding and unpaid; from all which the inference is strong that the bulk of the appraisal was applied in payment for the furniture, as the plaintiff claims, for there was nothing else to apply it on. But though that \$180 were never

applied on that note, yet that is accounted for by the plaintiff by the receipt of July 1, 1901, purporting to be signed by the defendant, acknowledging the receipt of that \$180, to settle in full for all the personal property the plaintiff bought of him on his farm, and reciting that that amount had been that day indorsed on the Smith & McCollister livery note. True, the defendant denies that the \$180 indorsed on that note that day grew out of their trade in any way, but says that the indorsement represents a cash payment by him, and that that receipt is a forgery, and he so testified.

But when we consider the character and conflict of the testimony; the fact that the note in suit is still in the plaintiff's possession; the unlikelihood that he would admit it paid, as claimed, when he had but recently employed counsel to commence suit upon it; the unsatisfactory reason the defendant gives for not taking it up if he paid it as claimed, as he was not a man of such ample fortune that he would be likely to give a 1750-dollar note and straightway forget it and not think of it again for three years, as he testified, but which is refuted by the receipt of June 17; and when we further consider that the burden of showing payment rests upon him; that he has to claim forgery, a thing presumed against, in order to overcome the receipt of July 1, and that the testimony strongly tended to show that the plaintiff's property was worth considerable more than the defendant's property, we think that with the receipt of June 17 in the case, there would be a strong probability of a different result on another trial.

Nor is said last-mentioned receipt cumulative evidence, for it is a deliberate admission by the defendant that the note was not paid as he claims, and no such admission was shown on trial.

Nor was the plaintiff in fault in not having the receipt at the trial, nor in not moving for a continuance because he did not have it. When preparing his case for trial, he was under an impression that he had some sort of a receipt from the defendant concerning his farming tools and stock that formed a part of the trade, and at the request of his counsel he and his wife made diligent search for it among all of his papers, but could not find it, and then concluded that he either never had one or had lost it. Right after the trial he went to the town clerk's office in Stowe to see if there was anything there to show why his deed from the defendant was not recorded till twelve days after it was given, and in looking for such a paper the town clerk found the receipt, which she had entirely forgotten about, and which she had not seen since it was left with her by the parties at the time it was signed, and which the parties had not seen, and the plaintiff had forgotten that it was left there, but as soon as it was found, he remembered about it.

Judgment of no error on trial, but judgment below reversed pro forma, petition sustained with costs, verdict set aside, new trial granted, and cause remanded.

WILLIAM L. SCOVILLE v. JAMES W. BROCK.

May Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and MILES, JJ.

Opinion filed January 7, 1907.

Guardian and Ward—Guardian's Final Account—Allowance by Probate Court with Ward's Consent and Approval after full Age—Bill to Vacate—Guardian's Failure to Instruct Ward as to his Legal Rights—Effect—Laches of Ward—Statute of Limitation—V. S.—2810—Influence of Guardian After Expiration of Guardianship—Equity Pleading—Effect of Sustaining Demurrer to Whole Bill.

Where a demurrer to the whole of a bill in equity is sustained, the orator must make a new case; but he may do so by amending the rejected bill, which will then be regarded as a new bill, and defendant's answer or other reply to the original bill treated as dropped from the pleadings, leaving him to plead anew.

Where after a demurrer to the whole of a bill in equity is sustained, defendant makes a new case by amending the rejected bill, any concessions contained in the answer to the original bill are not available to the orator as a part of the pleadings; but any material admission contained in that answer is provable in favor of the orator, like any other documentary admission *dehors* the record.

Where by fraud or misconduct one has gained an unfair advantage in proceedings at law, whereby the court of law will be made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of that advantage by either enforcing a judgment so inequitably obtained, or by relying upon it in defence.

In a suit in equity against the orator's former guardian to compel defendant to account for the trust estate, although the probate court, through defendant's alleged fraud, has allowed his final account as such guardian, it is not necessary, in order to grant affirmative relief, to vacate the decree of the probate court, for

defendant may be held accountable as trustee notwithstanding that decree.

In a suit in equity to compel the orator's former guardian to account for the trust estate, notwithstanding the allowance by the probate court of defendant's final account as such guardian, the master's findings examined, and *held* that the orator's claim that said allowance was made because of his approval of the final account, obtained by defendant's fraudulent concealments and representation, is not sustained.

The influence of a guardian over his ward is presumed to continue for a time after the guardianship has ceased.

In a suit in equity to compel the orator's former guardian to account for the trust estate, notwithstanding the allowance by the probate court of defendant's final account as such guardian, it appeared that, shortly after the orator became of age, defendant made a final settlement of his guardianship account in probate court, in the orator's presence and with his approval; that said final account was then allowed by the probate court, and all the property shown by the settlement to be due the orator was then turned over to and accepted by him. *Held*, that the finding that the defendant "in no manner sought to deceive his ward in any particular, but on the contrary gave him all the information he possessed in reference to the guardianship matters," is not sufficient to make the settlement binding upon the orator; that besides this, it was the duty of defendant to see that the orator was fully advised as to his legal rights in the premises. *Wade v. Pulsifer*, 54 Vt. 45, explained and followed.

In such case, the guardian cannot relieve himself of the duty of seeing that his ward is fully instructed as to his legal rights in the premises, by assuming that the probate court will give the requisite instruction.

The Statute of Limitations would not begin to run, as against the orator, till the influence of the confidential relation had ceased.

The Statute of Limitations would not begin to run, as against the orator, till something occurred to raise a doubt as to defendant's conduct; and, as the master finds that the orator did not know the law as to his rights till nearly eight years after he became of age, during which time he continued to have perfect confidence in the integrity of defendant and a belief that he had acted honestly, properly, and legally as his guardian, that defence cannot avail defendant.

V. S. 2810, relating to a further hearing on a guardian's final account within a fixed period after the allowance thereof by the probate court, and providing that the allowance then made should be conclusive, was not intended to create an exclusive remedy, or to operate as a limitation upon all remedy, if the time fixed was suffered to expire without having taken advantage of the provisions of that statute.

Since defendant's failure to instruct the orator as to his legal rights occasioned no loss to him unless defendant failed to exercise the requisite diligence in respect of certain investments in his hands, a question of fact concerning which the master has made no finding; and although, because the burden of proof as to that question is on defendant, it might be decided against him on the report, still as by that course injustice would be done defendant if he was not in fact negligent, the report is recommitted that the master may pass upon that question.

Where the probate court decrees to a minor certain stocks and bonds of nonresident corporations, as his interest in his father's estate, his guardian is not chargeable with negligence because he received such securities instead of demanding cash.

APPEAL IN CHANCERY. Heard on the pleadings, master's report and exceptions thereto, at the March Term, 1906, Washington County, *Rowell*, Chancellor. Decree, strictly *pro forma*, dismissing the bill with costs to the defendant. The orator appealed. This case has been twice before in the Supreme Court. See 75 Vt. 243, and 76 Vt. 385.

The orator became of age July 27, 1894. The defendant's final account as guardian of the orator was settled and allowed by the probate court, in the orator's presence and with his approval, on July 30, 1894. The defendant was duly appointed guardian of the orator by the probate court within and for the District of Washington in this State, on September 1, 1890, accepted the trust, and continued to act as such guardian till he settled his final account. On September 19, 1890, said probate court decreed to the defendant as guardian

of the orator, certain stocks and bonds of non-resident corporations, of the face value of \$7,032, as the orator's interest in his father's estate. The defendant received these stocks and bonds as such guardian, and held them till he turned them over to the orator at said final settlement. In the meantime certain of said corporations had failed, thereby rendering some of these securities worthless. It was in respect of the defendant's management of these securities that the orator complained. Among other things, the master reported: "William L. Scoville lived at Montpelier, Vermont, until he was 17 years old. He was at New Haven, Connecticut, for nearly five years and graduated from Yale College in 1896. He lived the next year in Rutland, Vermont, having decided to study law before going to Rutland. He went from there in the fall of 1897 to Cambridge, Massachusetts, where he has ever since resided. While in Rutland he was in the office of James A. Merrill, who was the judge of the city court, acting as clerk in the office, doing the detail work and correspondence and the general small matters of the office. When he left Rutland and went to Cambridge, Massachusetts, in the fall of 1897, he entered the Boston University Law School. He went as a soldier in the Spanish War and in the fall of 1898 he entered Harvard Law School. He was in that school until the fall of 1900, when he was admitted to the practice of law and commenced the practice of his profession in which he has ever since been engaged in Boston, Mass. In April or May, 1902, William L. Scoville brought some papers from his house to his office to sort out and file away in such a way that should occasion arise he could readily have access to them. When he came to sort and file away the papers he found among the papers thus brought to his office one of the certificates of stock that

he had received from his guardian in the settlement made in the Probate Court July 30, 1894. He was at that time very short of money and he thought what hard luck it was to lose all the money these papers represented and then for the first time the thought came into his mind that possibly something could be done about it, and he proceeded at once to look into the matter. He had not up to that time known or suspected that defendant was liable and had not known what the law was or had been as to his rights. He made an investigation in the State law library in Massachusetts and the next day or the following day he wrote Mr. Deavitt, of Montpelier, Vermont, laying the matter before him and asked him to take any steps that might be necessary. He wrote Mr. Deavitt May 12, 1902. Up to that time William L. Scoville continued to have perfect confidence in the integrity and ability of the said James W. Brock and belief that he had properly and honestly acted as his guardian and managed the securities in the hands of the guardian in a legal and proper manner."

Elbridge R. Anderson and *Edward H. Deavitt* for the orator.

The defendant was negligent in keeping all of the trust estate invested in the bonds and stocks of foreign corporations. *McCloskey v. Gleason*, 56 Vt. 264; *King v. Talbot*, 40 N. Y. 76; *Gray v. Fox*, 1 N. J. Eq. 259; *Dickinson, Apt.*, 152 Mass. 184; *Harvard College v. Amory*, 9 Pick. 461.

Melville E. Smilie for the defendant.

MUNSON, J. The master finds certain facts from the evidence, and leaves it for the Court to say what concessions contained in the answers are available to the orator. The

original bill was held insufficient on demurrer, (75 Vt. 243, 54 Atl. 177), and two several amendments thereto were afterwards filed. The defendant then answered the bill and the amendments, "waiving the answer to the original bill." The orator insists that the first answer could not be waived without the express leave of the court, citing *Morrill v. Morrill*, 53 Vt. 74. That, however, was an amendment interposing a further defence to the same bill, made on leave in the course of the hearing, and done by interlineation; and the decision was merely a condemnation of that method of making an amendment. In this case, a decree of the court of chancery sustaining the demurrer and dismissing the bill was affirmed in the Supreme Court, and the leave of the court was given when the case came back on remand.

Strictly speaking, where a demurrer to the whole bill is allowed the bill is out of court, and no subsequent proceeding can be taken in the cause. This is the rule as given in 3 Dan. Ch. Pr. 1st Am. Ed. 668. • The author remarked, however, that there were cases where the court had afterwards permitted an amendment of the bill to be made, and that even after a bill had been dismissed by order it had been considered allowable for the court to set the case on foot again. But the authority of these cases was questioned, and the author concluded that it might be considered a positive rule, liable to scarcely any exception, that after a demurrer has been allowed the case is entirely out of court. It is said, however, in *Mercantile Nat. Bank v. Carpenter*, 101 U. S. 567, 25 Law. Ed. 815, that the rigor of this principle has since been relaxed; and Mr. Beach in his *Modern Equity Practice*, § 279, speaks of the rule as one that formerly prevailed. But although the practice discountenanced by Daniel has since obtained, and is now gen-

erally established by rules of court, logically and technically the situation is the same. The orator must make out a new case, but may do this by amending the rejected bill. This being so, the defendant must be entitled to answer anew, the same as if replying to a bill new in form as well as new in fact.

The decisions point unmistakably to this conclusion. After an amendment, the defendant may demur to the whole bill, though a demurrer to the original bill has been overruled. *Bancroft v. Wardour*, 2 Brown's C. C. [*66]. He may demur, though the original bill has been answered. *Cresy v. Beavan*, 13 Sim. [*354]; *Dillon v. Davis*, 3 Tenn. Ch. 386 (395.) He may plead, although a full answer was put in to all that was contained in the original bill. *Ritchie v. Ayhwin*, 15 Ves. 79. He must answer all the interrogatories of the amended bill, though some of them are repetitions of those in the original bill and have been answered. *Mazareds v. Maitland*, 3 Madd. 66. It is apparent from these holdings that the amended bill is treated as a new bill, and the defendant's replies to the original bill, whatever they are, as dropped from the pleadings, leaving the defendant to plead anew. Otherwise he could not demur again to the whole bill, for coextensive demurrers are not allowed. Nor could he plead matters covered by his former answer, for the answer would overrule his plea. Nor would he be bound to answer interrogatories in the amended bill that he had already answered.

The right of the defendant to answer anew is broadly asserted by authorities which fully recognize the modern doctrine of amendment after demurrer sustained. It is said in 1 Beach Mod. Eq. Pr. §398, citing *Bowen v. Idley*, 6 Paige 46, and *Bosanquet v. Marsham*, 4 Sim. 573, that where a complainant amends his bill after answer it is a matter of right

for the defendant to put in a new or further answer to the amended bill, except where the amendment is one that cannot vary the right of the defendant; that if the substance of the bill is amended in any manner, however trifling, the defendant may put in another answer and make an entirely new defence.

So the answer to the original bill and the concessions contained in it are not now available to the orator. But any material admission which the answer contains is provable, like any other documentary admission not embraced in the record of the proceeding.

The substance of the orator's complaint is that the defendant was negligent in the management of the funds which he held as the orator's guardian, and thereby incurred losses for which he was legally chargeable; and that he induced the orator by fraudulent concealments and representations to approve a final account which relieved him from liability, and that the account was allowed by the probate court because of such approval; and that the decree in that behalf passed without contest and remained unappealed from because of the orator's ignorance of his rights in matters regarding which it was the defendant's duty to give him information. The original bill disclosed the existence of a decree, but contained no allegations regarding the proceedings on which it was based, and this was held insufficient on demurrer because the allegations that the orator's approval of the account was obtained by fraud were not followed by averments sufficient to carry the effect of the alleged fraud into the decree. 75 Vt. 243, 54 Atl. 177. The bill as amended and held sufficient on demurrer alleges, among other additional matters, that the decree was made solely by reason of the approval, and without the

consideration of any other fact or circumstance. 76 Vt. 385, 57 Atl. 967.

The findings bearing upon the approval are adverse to the orator. The guardian did not suggest the taking of the approval, nor know of it at the time, nor hear of it until informed by these proceedings. The judge of probate took the approval of his own motion, in accordance with his practice in such cases. He considered and passed upon the accountability of the guardian in the matters complained of, independently of the approval. The decree was made upon notice and appearance, after an opportunity to be heard, upon a consideration of matters known to the judge, and as a judicial disposition of the case. The master says he is unable to find that the approval had any influence whatever upon the court in reaching its conclusion. So the claim made by the amended bill in the respect above stated is not sustained.

But it appears from the findings that there was no actual inquiry or hearing, and the orator insists that his failure to contest the account, and his failure to appeal from the decree, were due to the defendant's fraud, and that equity will not permit the defendant to avail himself of the decree for his protection. It is well settled that when one has gained an unfair advantage in proceedings at law by fraud or misconduct, whereby the court of law will be made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of the advantage thus unfairly obtained. *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067. The usual application of this rule is in cases where the party in fault is seeking to enforce a judgment, but the reason of it requires its application where the judgment is relied upon in defence. It is not necessary to inquire as to the circumstances in which equity will

act directly upon a probate decree. Inability to vacate a decree will not prevent affirmative relief, for a trustee may be held accountable, notwithstanding the decree, for what was improperly retained. *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. 98; *Aldrich v. Barton*, 138 Cal 220, 94 Am. St. 43, and note. It remains to inquire whether the findings entitle the orator to relief of this nature.

It is found that the defendant "in no manner sought to deceive his ward in any particular, but on the contrary gave him all the information he possessed in reference to the guardianship matters." It is found more specifically that at the time of the settlement in the probate court the guardian produced the securities and told his ward all that he knew about them; that he told him they were the identical securities turned over to him by the estate, that they had ceased paying interest and dividends at certain dates, that nobody knew what the value of them was, and that some of them might turn out to be good and some might not. Neither party had counsel present and nothing was said to the ward about his having professional or other disinterested advice.

A few days before the settlement the guardian showed a rough draft of his account to the probate judge, and said that considering the way the securities had come into his hands, and the suddenness with which some of them had depreciated in value or become worthless, he ought not to be held responsible. To this the judge made no reply. The judge had some personal knowledge of the character of the securities and considered in view of the knowledge he had that the guardian ought not to be held responsible for the depreciation, and therefore approved the account. Nothing was said at the hearing by anyone about the question of the guardian's liability

for the losses. It appears from the guardian's earlier remark to the judge that he understood that the situation was such that a question as to his liability might be raised. Was it his duty in the circumstances to say this to his ward, or advise him of his privileges regarding counsel?

The finding that the guardian in no way sought to deceive his ward does not dispose of the case. The question is not merely whether there was actual fraud or intentional wrongdoing, but whether there was a failure to comply with the rules which the law has established for the protection of beneficiaries. *Walworth's Est. v. Bartholomew's Est.*, 76 Vt. 1, (11) 56 Atl. 101. Nor is the case disposed of by the finding that the guardian gave his ward all the information he had regarding the securities. The ward was entitled to be informed not only of the facts but of his rights with reference to the facts. *Perry on Trusts*, §851; *Hall v. Turner's Est.*, 78 Vt. 62 (68); *Burrows v. Walls*, 5 De. G. M. & G. 233. It is clear that the statement in some of our cases that the guardian must advise his ward of all the facts, was not intended to limit this rule; for it is the holding of all the cases that the guardian cannot deal with the ward in his own interest without first placing him upon an equal footing with himself, and this requires something more than a knowledge of the facts. This subject is fully treated in *Wade v. Pulsifer*, 54 Vt. 45.

It is claimed, however, that *Wade v. Pulsifer* is not an authority upon the facts presented here. It is said that the transaction in that case was during the ward's minority, while this transaction was after the ward became of age. But this cannot serve to distinguish the cases; for the influence of the fiduciary relation is presumed to continue for a time after the guardianship has ceased. 1 Story Eq. Jur. §217; *Scoville v.*

Brock, 76 Vt. 385; *Gillett v. Willey*, 126 Ill. 310, 9 Am. St. 587. It is also said that one transaction was a gift and the other a settlement, but this affords no basis for distinguishing the cases. No satisfactory ground of distinction can be found between the making of a gift and the waiver of a right to enforce a liability. The distinction between gifts and releases made by Chancellor Kent in *Kirby v. Taylor*, 6 Johns. Ch. 242, is discredited by a long line of decisions to the contrary. Note 89 Am. St. 303.

But the matter mainly relied upon to distinguish the two cases is the fact that the gifts in the *Pulsifer* case were made out of court, and that there was nothing in the guardian's account, and nothing said at the hearing, to bring them to the attention of the court. It is urged that the duty of information, as far as it relates to the legal rights of the ward, can have no application to a settlement made in court. This claim, as far as it is based on the nature and effect of the proceeding, is sufficiently covered by the previous discussion. It certainly cannot be sustained on the theory that it is the duty of the probate judge to give the ward whatever legal information his interests may require. If a probate judge has any duty in this respect it is one that results from the special circumstances of the particular case, and is nothing that a guardian can rely upon to relieve him from this requirement. The duty in question is one that grows out of the relation between guardian and ward; and it is the guardian's duty to see that his ward has this information before making a final settlement.

But the defendant contends that any right the orator may have had is barred by the expiration of the statutory period of limitation. The statute would not begin to run until the in-

fluence of the confidential relation had ceased. *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967. The defendant refers to the statement that the orator and the defendant met but once after the settlement and had no other communication by letter or otherwise, and treats this as a finding that the influence of the confidential relation ceased immediately after the termination of the relation. But the master finds that up to the spring of 1902 the orator had not known the law as to his rights, and had not suspected that the defendant was liable for the losses, and had continued to have perfect confidence in the integrity of the defendant, and a belief that he had acted honestly, properly and legally as his guardian. Although there were no further personal relations to keep up the guardian's direct influence upon the ward, that influence continued to exist in the confidence and beliefs generated by the previous relation and the manner of its termination; and the statute would not come into operation until something occurred to raise a doubt as to the guardian's conduct.

V. S. 2810, also referred to by the defendant, is not a bar to the relief sought. This section relates to a further hearing in the probate court and to the finality of an allowance then made. It was not intended to create an exclusive remedy, and so operate as a limitation upon all remedy if the time fixed was suffered to expire without advantage being taken of the provision.

But the omission of the duty we have pointed out does not make the defendant liable if it did not occasion loss to the orator, and it occasioned no loss to the orator if the defendant exercised the requisite care and diligence in respect to the investments in his hands, for it is only upon the ground that this was wanting that the defendant can be made liable. But

the question whether the defendant exercised proper care and diligence in the circumstances of the case is a question of fact, and the master has not passed upon it. It is doubtless true that the burden of proof as to this is on the defendant, so that the question could be decided against him on the report as it stands; but we are not inclined to take this course, for injustice would then be done the defendant if he was not in fact negligent. It is therefore deemed proper to have the report recommitted that the master may pass on this question.

The defendant is not chargeable with negligence in receiving the securities instead of demanding cash. It was so held in *Scoville v. Brock*, 76 Vt. 385, 57 Atl. 967, and the facts upon this point are now the same as were admitted by the demurrer. The inquiry will be whether the defendant in continuing to hold the securities, acted with fidelity, and with that measure of care and diligence that a prudent man would have exercised in the same circumstances. And if it is found that the defendant, in the faithful and prudent administration of his trust, ought to have disposed of the securities at any time, the value of the securities is to be determined with reference to that time.

Pro forma decree reversed, and cause remanded that the report may be recommitted for the purpose stated.

STATE v. JOSEPH LOUANIS.

October Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed January 10, 1907.

*Criminal Law—Blackmail—V. S. 4921—Threat Defined—
Evidence—Threatening Others—Sufficiency of Indictment
—How Questioned After Issue Joined—Motion to Quash
—Discretion of Court—Instructions.*

A motion to quash an indictment is addressed to the discretion of the trial court, and its action thereon is not revisable.

After a respondent has, by his plea of not guilty, joined issue on the allegations of fact in the indictment, and the jury is empanelled, any evidence pertinent to the issue is admissible, regardless of the sufficiency of the indictment, any defect in which can thereafter be taken advantage of only on motion in arrest of judgment.

In a prosecution, under V. S. 4921, for threatening to accuse a certain man of the crime of adultery with a woman named, with the intent to extort money, it was proper, as bearing upon the respondent's intent, to allow the State to show by a third person that, about the same time, the respondent accused him of that crime with the same woman, and threatened him with imprisonment unless he would pay the respondent \$20.

In a prosecution for threatening to accuse another person of a crime with intent to extort money, where before a witness was allowed to testify for the State to a conversation with the respondent about the matter charged, the respondent claimed that the conversation was privileged, as he understood at the time that the witness was his attorney, and at the respondent's request the witness was given a preliminary examination to determine that question, at which the respondent neither testified nor offered to testify, and which resulted in the finding that the relation of attorney and client did not exist, it was discretionary with the court whether to re-open that question when the respondent took the stand in defence, and admit his offered testimony that he

understood that said witness was his attorney; and as the court properly exercised that discretion by excluding the offer, the exclusion is not the subject of exception.

A threat, within the meaning of V. S. 4921, imposing a penalty for threatening to accuse another person of a crime, with intent to extort money, is a menace of such a nature as to unsettle the mind of the person on whom it is intended to operate, and to take from his acts that freedom essential to constitute voluntary consent.

In a prosecution under V. S. 4921, for threatening to accuse another person of a crime, with intent to extort money, the court need not define "extort" to the jury; and it is proper for the court to refuse to charge that the threat must be such as to overcome the will of an ordinarily prudent man, and to leave it to the jury to say whether the threat was calculated to disturb and unsettle a man's mind and give anxiety.

V. S. 4921 is aimed at blackmailing, and a threat of any public accusation is as much within its reason as one of a formal complaint instituting a criminal prosecution.

INDICTMENT, under V. S. 4921, for threatening to accuse another person of a crime, with intent to extort money. Plea, not guilty. Trial by jury at the June Term, 1906, Orange County, *Tyler, J.*, presiding. Verdict, guilty; and judgment thereon. The respondent excepted.

The indictment charged that the respondent threatened to accuse one J. H. Tarbox with having committed the crime of adultery with one Mary Jane Brasseaue, a married woman, and the daughter of the respondent. Said Tarbox testified for the State that on January 24 or 25, 1906, and again upon the following Saturday, the respondent accused him of the crime named in the indictment, and said that he had a list of the names of thirty other men who had committed the same crime with his daughter, and that unless the witness would give him \$10, he would make trouble for the witness and his wife. Subject to the respondent's objection and exception, the State was allowed to show by one Robert Fulton that on January

24, 1906, the respondent accused him of having committed adultery with the same woman, saying that the witness's name was on his list, and threatened the witness with imprisonment unless he paid the respondent \$20 to settle.

Subject to the objection and exception of the respondent, the witness Williams, after the preliminary examination referred to in the opinion, was allowed to testify that, in January, 1896, the respondent told him that he had a list of the names of twenty-one men who had committed the crime of adultery with said woman; that he had seen said Tarbox, who was on the list, and had told him that he would take \$10 to settle, and that if Tarbox did not settle, the respondent would have him in jail; that he had also seen said Fulton, who was on the list, and had notified Fulton that he must pay \$20 to settle; that he had charged Fulton more, because he was better able to pay.

Stanley C. Wilson for the respondent.

The court erred in its charge as to what constitutes a threat within the meaning of the statute, and in refusing to charge in that regard as requested by the respondent. *Rex v. Southerton*, 6 East 127; *State v. Benedict*, 11 Vt. 236; *Sively v. State*, 44 Tex. 274; *Grimes v. Gates*, 47 Vt. 594.

M. M. Wilson, State's Attorney, for the State.

Evidence tending to show another similar offence committed about the same time and as a part of the same scheme is admissible on the question of intent. *State v. Sargood*, 77 Vt. 85; *State v. Marshall*, 77 Vt. 262; *People v. Molineaux*, 62

L. R. A. 193; *State v. Kelley*, 65 Vt. 531; *State v. Lewis*, 96 Iowa 297.

The question of the competency of the witness, Williams, was for the court, and if there is any evidence tending to support its decision, such decision is final. *Cairns v. Mooney*, 62 Vt. 172; *Nelson v. First Nat. Bank*, 69 Fed. 798; *Clement v. McGinn*, 33 Pac. Rep. 920; *Reynolds v. Lounsbury*, 6 Hill 534.

ROWELL, C. J. This is an indictment for threatening to accuse one Tarbox of adultery, with intent to extort money from him.

Pending the plea of not guilty, the prisoner moved to quash the indictment because it did not set out the year when it was found, and was not dated, and because it did not appear on its face when the grand jury was impanelled.

We do not consider whether the motion could be interposed pending the plea, for such a motion is not a right, but is addressed to the discretion of the court, and hence its action thereon is not revisable here. *State v. Stewart*, 59 Vt. 273, 284, 9 Atl. 559; *Bishop's New Crim. Proceed.* §761.

After the jury was impanelled and before any evidence was given, the prisoner objected to the admission of any evidence, for that the indictment was insufficient for the reasons stated in the motion to quash. But this objection could not avail him, for having joined issue by his plea of not guilty on the allegations of fact in the indictment, any evidence pertinent to the issue was admissible. *Barney v. Bliss*, 2 Aik. 60; *Chase v. Holton*, 11 Vt. 347; *Briggs v. Mason*, 31 Vt. 438, 439; *Newman v. Wait*, 46 Vt. 689.

The objection to evidence because the indictment did not show that the crime was committed in the county nor even in

the State, is disposed of on the same ground. The prisoner should have raised the question by a motion in arrest.

The testimony offered to show that the prisoner made similar threats to others, was admissible, to show that the threats charged were made with the intent alleged.

Mr. Williams testified for the State to a conversation with the prisoner about the matter charged. The prisoner claimed that the conversation was privileged, as he understood at the time that Williams was his attorney. To determine the question of privilege, Williams was given a preliminary examination at the request of the prisoner, but at which he did not testify nor offer to testify. The court found from Williams's testimony, and rightly, that the relation of attorney and client did not exist, and Williams was permitted to testify. When the prisoner took the stand in defence, he offered to testify that he understood that Williams was his attorney. But the competency of Williams having been inquired into and passed upon and his testimony admitted, it was discretionary with the court whether to reopen the question and admit the testimony; and it properly exercised that discretion by excluding it, which is not the subject of exception. The other objections to Williams's testimony are not sustained.

We cannot hold that a threat of accusation otherwise than by course of law, is not within the statute. The statute is aimed at blackmailing, and a threat of any public accusation is as much within the reason of the statute as a threat of a formal complaint, and is much easier made, and may be quite as likely to accomplish its purpose. There is nothing in the statute that requires such a restricted meaning of the word "accuse"; and to restrict it thus, would well nigh destroy the efficacy of the act. There are, seemingly, but few cases on this question,

and those to which we are referred are not so very much in point, because of the difference between the statutes there involved and our statute; but they may be referred to for what they are worth. *Rex v. Robinson*, 2 Moody & Rob. 14; *Regina v. Redman*, 10 Cox C. C. 159; *People v. Braman*, 30 Mich. 460, where the question is discussed *pro* and *con* but not decided; *People v. Frey*, 112 Mich. 251, where it is alluded to but neither discussed nor decided; *State v. Lewis*, 96 Iowa 286; and *State v. Debolt*, 104 Iowa 105.

The prisoner excepted to the refusal of the court to charge that the threat must be such as to overcome the will of an ordinarily prudent man, and to the charge as given on that subject. The court left it to the jury to say whether the threat was calculated to disturb and unsettle a man's mind and give anxiety; whether it was calculated to disturb a man and unsettle him—overcome his mind. This fulfilled the requirement of the law. A threat is well defined to be a menace of such a nature as to unsettle the mind of the person on whom it is intended to operate, and to take away from his acts that free, voluntary action which alone constitutes consent. 28 Am. & Eng. Enc. Law, 2d Ed., 141. Bouvier says that the threat must be such as to operate to some extent, at least, on the mind of the one whom it was intended to influence.

It was not necessary for the court to define "extort" to the jury. It is a common word, used in the statute in its ordinary sense, and the court might well assume that the jury understood it.

Judgment that there is no error in the proceedings of the county court, and that the prisoner take nothing by his exceptions.

ALMAR W. SHATTUCK'S ADMR. v. CENTRAL VERMONT RAIL-
WAY CO.

October Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, POWERS, and
MILES, JJ.

Opinion filed January 10, 1907.

*Master and Servant—Negligence—Death by Wrongful Act—
Railroads—Derailment—Proximate Cause—Question for
Jury—Instructions—Contributory Negligence and As-
sumption of Risk—Harmless Confusion.*

In an action against a railroad company for the death of a locomotive engineer, resulting from his locomotive, with the ties, rails, and ballast, being precipitated down the railroad embankment, evidence considered, and held that it tended to show that the proximate cause of the accident was the insufficiency of the ties and rails, as alleged in the declaration; and that it was proper to submit to the jury the question whether that was the proximate cause, or whether the accident was due to a defective roadbed, as claimed by defendant, but not counted upon in the declaration.

It appeared that on July 31, the road was changed from a narrow gauge to a standard gauge, which required further work of construction, replacing of ties, and ballasting, before the completion of which, and on August 28, the accident happened; that between those dates the decedent's train was derailed many times, once before on the day of the accident. Held that, although by continuing in the service after the change of gauge, the deceased may have assumed the risk of dangers thereby created, the danger from insufficient ties and rails was not thereby created, but was an extraordinary risk not assumed by the deceased unless he had actual or imputed knowledge thereof.

Although the court in its charge may have confounded contributory negligence and assumption of risk, if there is any difference between them, defendant was not harmed thereby, for under the charge the jury must have negatived both assumption of risk and contributory negligence.

CASE for negligence, brought by an administrator for benefit of the widow and next of kin, under V. S. 2451-2452. Plea, the general issue. Trial by jury at the April Term, 1906, Windham County, *Tyler, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

At the close of all the evidence, the defendant moved that a verdict be directed for it on the grounds that the evidence discloses no fact having a tendency to show that the defendant was liable as claimed in the declaration; that the dangers which caused the death of the deceased were incident to his employment, and therefore assumed by him; that as the road was undergoing construction and change from a narrow gauge to a standard gauge, as the deceased knew, by continuing in the service he assumed the risk of the dangers which caused his death. This motion was overruled, to which the defendant excepted.

Among other things, the court instructed the jury: "If there was any defect about this road at the point of the accident which Mr. Shattuck knew, or in the exercise of reasonable care he might have known, then it was a risk he assumed, and his administrator cannot recover for it; but although he knew of defects at other places in the road, and had met with accidents, unless there was something that called his attention to some defect at this particular place, and if he did not see it and could not, in the exercise of reasonable care in addition to his other duties as engineer, if he could not have seen it, then he did not assume the risk."

To this the defendant excepted, claiming that if the deceased had knowledge of defects of this general class anywhere on the road, he assumed the risk.

The declaration counted upon the negligence of the defendant in failing to provide, use, and keep in place in said

track suitable and proper rails, suitably and securely fastened together, and to provide, use, and keep in place in said track a sufficient number of ties or sleepers, of sound, suitable, and proper wood, and of sufficient size.

Hunton & Stickney for the defendant.

Plaintiff's intestate assumed the dangers incident to running an engine over the road while it was in process of construction, an occupation fraught with dangers which he fully understood and which caused his death. 1 *Shear & Red. Neg.* §185; *Skinner, Admr. v. C. V. R. R. Co.*, 73 Vt. 336; *Johnson v. Boston & Maine R. R.*, 78 Vt. 334; *Brick v. Rochester &c. R. Co.*, 98 N. Y. 211; *Wannamaker v. Burke*, 111 Pa. St. 423.

ROWELL, C. J. This is an action upon the statute for the benefit of the widow and next of kin of the deceased, whose death is alleged to have been caused by the negligence of the defendant. The deceased was an engineer on the defendant's railroad from Brattleboro to South Londonderry. The road was originally a narrow gauge, but was changed to a standard gauge in a single day by moving the rails on each side the requisite distance. This change required further work of construction, replacing of ties, ballasting, etc. After the change, but before the work of construction was completed, the engine that the deceased was running slid from the roadbed, the roadbed and the rails slid down a bank, the engine was overturned, and the deceased thereby killed. The change was made the 31st of July, and the accident happened the 28th of August, and during that time the deceased's train was derailed many times to a greater or less extent, and once before on the day of the accident. The rails in the vicinity of the

accident were of steel, but of iron at the point of accident, and of less weight. It appeared that an iron rail was broken at that point, and that a piece of it went through the ashpan, and up through the air drum, and struck against the tender so as to bend it up at the end. Another piece of rail was found near by, which the testimony tended to show was broken from the piece that went through the ashpan. The testimony on the part of the plaintiff tended to show that some of the ties at the point of accident were too short, and badly decayed, especially at the ends.

The claims of the parties on trial can be best understood if stated in the words of the charge, thus: "There have been two theories argued to you by counsel on the respective sides. The plaintiff claims, and his counsel argues to you from the testimony and this piece of rail shown you here in court, that the primary cause of the accident was the breaking of this rail; that that let the engine down, and that being down, it went down the bank taking a portion of the roadbed with it. On the other hand, the defendant claims, and its counsel argue to you, that the more reasonable theory is, that the roadbed itself was insufficient, so that when this heavy engine came along over it at this particular point, the roadbed itself went down, without regard to any insufficiency of the ties or the rails, but that it was the roadbed that gave way. Now if you should find that this was really the cause of the accident, that it was the sinking of the roadbed and not the fault of rails or the rails and the ties, then the plaintiff cannot recover, because he has not sued for any defect in the roadbed itself. I have already called your attention to that, that for the plaintiff to recover he must show that the defect was in the rails or the rails and the ties, or the tie itself, and that in consequence of this defect the engine went through and down the

bank, and carried some of the roadbed with it. So I have called your attention to these two theories, and you must consider all the evidence bearing upon them, and say which, in your judgment, is the correct one." And the plaintiff's claim was justified, both by his declaration and his evidence.

By continuing in the service after the change of gauge, the deceased may have assumed the risk of dangers thereby created, as claimed by the defendant. But the danger here complained of was not thereby created, but existed independently of it, as the plaintiff's evidence tended to show; and therefore the case as presented is one of an extraordinary risk, because existing by the fault of the defendant, and therefore not assumed by the deceased unless he had knowledge of it, actual or imputed.

But the defendant says that in any view of the case the court confounded contributory negligence and assumption of risk. This may be so, if there is any difference between them, as some say there is, for they say that contributory negligence can arise only when there is negligence on the part of the defendant, in which case, contributory negligence breaks the causal connection between the defendant's negligence and the injury complained of, and thus itself becomes the proximate cause of the injury, and defeats recovery; whereas assumption of risk negatives the existence of any duty on the part of the defendant by the breach of which he could be a wrongdoer.

But be this as it may, the defendant was not harmed by the confusion if any there was, for under the charge, the jury must have negatived both contributory negligence and knowledge of the risk.

Judgment affirmed.

HENRY A. DUNBAR v. CENTRAL VERMONT RAILWAY CO.

October Term, 1906.

Present: ROWELL, C. J., MUNSON, WATSON, HASELTON, and MILES, JJ.

Opinion filed January 12, 1907.

*Master and Servant—Injury of Servant—Extraordinary
Danger—Assumption of Risk—Burden of Proof—Evi-
dence—Failure to make Offer—Motion in Arrest.*

In an action by a servant against his master for injuries resulting from an extraordinary danger, the burden is on plaintiff to show that he did not assume the risk by voluntarily encountering the danger after he comprehended it.

The test of whether a servant has assumed the risk of an injury resulting from an extraordinary danger is, not whether he exercised care to *discover* the danger, for he has a right to assume that it does not exist; but whether he actually or presumably knew and comprehended it.

In an action by a railroad conductor for injuries resulting from the derailment of his train caused by the ties being so unsound and insufficient that the spikes could not hold the rails in place under the pressure of the train in going around the curve where the accident happened, the risk was an extraordinary one; and it was error to submit the case to the jury upon the theory that, as there was no evidence tending to show that plaintiff knew of the defect, he was ignorant thereof, thereby casting upon defendant the burden of showing assumption of risk.

Since the risk relied upon by the declaration and shown by plaintiff's evidence was an extraordinary one, defendant's offered evidence that a large per cent. of derailments can neither be accounted for nor guarded against, was properly excluded as immaterial.

Defendant's offered evidence as to the condition of the roadbed a year and a half after the accident was properly excluded, it not appearing that its condition then was the same as at the time of the accident.

Where it does not appear what answer was expected to a question excluded in direct examination, its exclusion does not show error.

Where the record does not show that an exception was taken to the overruling of a motion in arrest of judgment, that question will not be reviewed.

CASE for personal injuries. Plea, the general issue. Trial by jury at the September Term, Franklin County, 1905, Tyler, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The question to the witness Walsh, referred to in the opinion, was asked in his direct examination.

C. W. Witters, and *H. Henry Powers* for the defendant.

The burden was on the plaintiff to show the absence of knowledge, actual or imputed, of the extraordinary risk which caused his injury. *Pierce on Railroads*, 382, 383; *Tex. & Pac. R. R. v. Barrett*, 166 U. S. 617; 6 Thomp. Neg. §7531; *Brainard v. Van Dyke*, 71 Vt. 359, Lawson, Presump. Ev. 133.

Brigham & Start, *Alfred A. Hall*, and *Senter & Senter* for the plaintiff.

A servant assumes only those extraordinary risks which he knows and comprehends, or which he ought to know and comprehend. *Kilpatrick v. R. R.*, 74 Vt. 288; *Dumas v. Stone*, 65 Vt. 442; *Skinner v. R. R.*, 73 Vt. 340.

ROWELL, C. J. This is case to recover for personal injuries to the plaintiff by the derailment of a passenger train that he was conducting over the defendant's railroad.

The declaration alleged, and plaintiff's evidence tended to show, that the derailment was occasioned because the ties were so unsound and insufficient that the spikes could not hold the rails in place under the pressure of the train in going around the curve where the accident happened.

The defendant moved for a verdict, for that there was no evidence tending to show any negligence on the part of the defendant that the plaintiff did not know, or from his long experience on the road, ought to have known. This raised the question of on whom was the burden of proof as to the assumption of risk. There was nothing in the case to show whether the plaintiff knew the condition of the road or not save what might be inferred from the fact that he had recently run his train over it several times without accident. But the court took no note of that fact as ground for an inference either way, but thought there was no evidence that the plaintiff knew of the defect, and therefore assumed that he did *not* know, and submitted the case accordingly, thereby casting the burden upon the defendant of showing assumption of risk, and relieving the plaintiff from the burden of showing non-assumption.

But the risk was not an ordinary risk, existing without the fault of the defendant, and therefore assumed by the plaintiff; but an extraordinary risk, as it existed by the fault of the defendant, and therefore was not assumed by the plaintiff, unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it; then, in either case, he cannot recover. *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097; *Texas & Pacific Railway Co. v. Archibald*, 170 U. S. 665, 673; *Choctaw &c. R. R. Co. v. McDade*, 191 U. S. 64, 68. It will be noticed that the test is, not whether the servant exercised care to discover the danger, for he is not bound to do that when he has a right to assume that it does not exist; but whether he knew and comprehended it, actually or presumably. Some of our cases in stating the test, may involve the idea of care on the part of the servant;

but generally, when rightly understood, they state it with substantial accuracy, we think.

Hence want of such knowledge and comprehension was an essential element of the plaintiff's case, and consequently the burden was on him to negative them, otherwise he would be taken to have assumed the risk, and could not recover. Such is the law of this State, and of some of the other States, though some hold the other way. In *Brainard v. Van Dyke*, 71 Vt. 359, 45 Atl. 758, the plaintiff was injured by the explosion of dynamite that the defendant, her master, had put into a hot stove oven in his house where she was at work, without informing her of its dangerous character; and because the declaration did not allege her ignorance of its dangerous character, it was held bad on demurrer. This is the rule of the common law. Thus, *Griffiths v. The London & St. Katherine Docks Co.* 13 Q. B. D. 259, in the Court of Appeals, was an action by a servant of the defendant for personal injuries resulting from the negligently unsafe condition of the premises whereon the servant was employed. Although the action was brought after the passage of the Employers' Liability Act of 1880, it was not founded upon it. The declaration of claim alleged that one of the iron doors that formed part of the warehouses of the defendant's dock gave way and fell upon the plaintiff who was in the defendant's employment. It contained no allegation that the plaintiff was ignorant of the insecure condition of the door, nor of the danger to which he was exposed, but alleged only that the defendant knew, or ought to have known, of the defective, unsafe, and insecure condition of the door, and that it was altogether owing to the defendant's negligence that it was not put into a safe and secure condition. The declaration was held bad for not alleging want of knowledge on the part of the plaintiff. Brett, M.

R., said that if the danger is one that was known to the master and not to the servant, the knowledge of the master and the want of knowledge of the servant make together a cause of action, and as it is necessary for these two things to exist in order to form a *prima facie* case, it is necessary that they should be shown to exist by the declaration. Bowen, L. J., said that the old form of declaration used to show that the danger that caused the accident was known to the master and unknown to the servant; that both of these allegations are necessary, because without them there is no cause of action, and that unless it is shown at the trial or there are facts from which it can be inferred that the servant was ignorant of the existence of the danger he would be nonsuited. Fry, L. J., said that it appeared plain to him that the knowledge of the master and the ignorance of the servant are necessary to constitute a cause of action.

This statement of the substantive law of the case is sufficient to obviate the necessity of specifically considering the requests to charge that are relied upon, for they are directed in varying ways to substantially the same question.

The defendant claimed that the derailment could not be accounted for nor guarded against, and offered to show that a large per cent. of the derailments are of that character, for the purpose of showing that they are ordinary risks of the business, and therefore assumed by the servant. But as we have seen, the risk in question, as shown by the declaration and the plaintiff's evidence, was not an ordinary risk, but an extraordinary risk, and the plaintiff could not recover unless he showed that the accident happened substantially as alleged in the declaration. *Clark v. Employers' Liability Co.*, 72 Vt. 458, 467, 48 Atl. 639. Therefore the testimony was offered to show a thing not in issue, and properly excluded.

As it does not appear what answer was expected to the question put to the witness Walsh, its exclusion does not show error. The question put to the witness Brown as to the condition of the roadbed as to ballast when he examined it a year and a half after the accident, was properly excluded, because it did not appear that its condition was the same.

The defendant moved in arrest, and insists that the declaration is bad for not alleging that the plaintiff was ignorant of the danger. But we cannot consider the motion, for it does not appear that any exception was taken to the overruling of it.

Judgment reversed and cause remanded.

PETER MORRILL'S ADMX. v. CATHOLIC ORDER OF FORESTERS.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, POWERS, and
MILES, JJ.

Opinion filed January 19, 1907.

*Corporations—Corporate Seal—Sealed Life Insurance Policy
—Whether a Specialty—Action Thereon—General Assumpsit—No. 121, Acts 1896.*

A corporation may, for the time, adopt any seal it chooses as its corporate seal, and such seal, affixed to an instrument, attested by the signatures of the proper officers, is *prima facie* evidence that it was lawfully affixed, and that the instrument is the act of the corporation.

After the death of the covenantee named in a sealed life insurance policy, only his legal representative can maintain an action thereon, although the covenant is for the benefit of third persons.

In general assumpsit, under No. 121, Acts 1896, on a certificate of life insurance, where defendant demanded and was granted oyer of the certificate, and thereupon recited it in a demurrer to the declaration, the certificate was thereby made a part of the declaration, regardless of whether the defendant was entitled to such oyer.

A certificate of life insurance headed, "High Court Catholic Order of Foresters," reciting that it is issued to the insured as a member of the order, at whose death the "Catholic Order of Foresters" promises to pay \$1,000 to the beneficiaries therein named, concluding with, "In Witness Whereof the High Court of the Catholic Order of Foresters has hereunto affixed its seal and caused this certificate to be signed by its High Chief Ranger and attested and recorded by its High Secretary," purporting to be so signed and attested, witnessed, and having affixed thereto a large seal bearing the impress, "High Court Catholic Order of Foresters," is a specialty; and in the absence of evidence to the contrary, it will be presumed that said seal is the proper and common seal of the Catholic Order of Foresters.

Bank of the Metropolis v. Guttschlick, 14 Pet. 19, distinguished.

No. 121, Acts 1896, providing that general assumpsit shall be a sufficient declaration in actions on policies of insurance, "and no other or different one shall be required," does not make the action of assumpsit appropriate where it is not so at common law; therefore, general assumpsit on a sealed policy of life insurance cannot be maintained under that Act.

GENERAL ASSUMPSIT on a certificate of life insurance, brought under No. 121, Acts 1896. Heard on demurrer to the declaration at the March Term, 1906, Orleans County, *Watson*, J., presiding. Demurrer overruled, *pro forma*, and declaration adjudged sufficient. The defendant appealed. The certificate in question recited that the "Catholic Order of Foresters hereby promises and binds itself to pay" \$1,000 to the beneficiaries therein named.

Young & Young for the defendant.

The seal affixed to the certificate is a legal seal. 25 Am. & Eng. Enc. of Law, 73, 80; *Beardsley v. Knight*, 4 Vt. 471; *Bank v. Slason*, 13 Vt. 334; *Bates v. Boston, etc. R. Co.*, 92 Mass. 251; *Warren v. Lynch*, 5 Johns. 239; 4 *Thomp. Corp.*, §5070; *Allen v. Sullivan R. Co.*, 32 N. H. 446.

Said seal is the corporate seal of the Catholic Order of Foresters for the purpose of sealing the certificate, whether it is the common seal of that corporation or not. 4 *Thomp. Corp.*, §5079; *Bank of Middlebury v. Rutland, etc. R. Co.*, 30 Vt. 159; *Stebbins v. Merritt*, 64 Mass. (10 Cush.) 27; *Mill Dam Foundry v. Hovey*, 38 Mass. (21 Pick.) 417; *Jacksonville, etc. Ry. & Nav. Co. v. Hooper*, 160 U. S. 514.

The certificate is a specialty. 4 *Thomp. Corp.* §5068, p. 3787; *Warren v. Lynch*, 5 Johns, 239; *Bates v. Boston, etc., R. Co.*, 92 Mass. 251, 7 Am. & Eng. Enc. of Law, 693; 25 Am. & Eng. Enc. of Law 80; *Conine v. Junction, etc. R. Co.*, 3 *Houst.* 288; *Clark v. Farmers Woolen Mfg. Co.*, 15 *Wend.* 256; *Allen v. Sullivan R. Co.*, 32 N. H. 446; *Cheney v. Gates*, 12 Vt. 565; *Bank of Middlebury v. Rutland, etc., R. R. Co.*, 30 Vt. 159; *Woodman v. York, etc. R. Co.*, 50 *Me.* 549.

A corporate seal affixed to a contract executed by a corporation where the instrument shows that it was intended to seal it, whether by express terms or by reasonable construction, makes such contract a sealed instrument. 25 Am. & Eng. Enc. of Law 73; 2 *Bl. Com.* 306.

The beneficiaries named in this certificate have an interest in the proceeds thereof which became absolute and vested in them immediately upon the death of the insured. 3 Am. & Eng. Enc. of Law 1108; *Worley v. Northwestern Masonic Aid Assn.*, 10 *Fed.* 227; *Felix v. Grand Lodge, etc.*, 31 *Kan.*

81; *Briggs v. Earl*, 139 Mass. 473; Niblack on Ben. Societies (2nd Ed.) 396; Bacon on Ben. Societies (3d Ed.) §237.

The only way to test the right of oyer is for the opposing party to counter plead or demur; and plaintiff not having done either, the right is conceded. Gould Pl. Ch. 8, §62; Stephen Pl. 72.

An administrator or executor cannot maintain an action to recover a fund unless the judgment when recovered becomes assets of the estate. 1 Chitty's Pl. 203; *Perkins v. Mathes*, 49 N. H. 107; *Pope v. Stacy*, 28 Vt. 96.

J. W. Redmond for the plaintiff.

The seal on this certificate is not the corporate seal of the defendant. *Osburne v. Tunis*, 25 N. J. L. 633; *Whiteford v. Laidler*, 94 N. Y. 151; *State v. Atlier*, 18 Ark. 269; *Regents of University of Mich. v. Detroit &c., Soc.*, 12 Mich. 138; *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19.

If the seal is the corporate seal of defendant, it does not make the instrument a specialty. 4 Thomp. Corp., §§5053, 5054; *Central National Bank v. Charlotte Railroad Co.*, 22 Am. Rep. 14; *Levering v. Memphis*, 7 Humphr. (Tenn.) 553; *Brown v. Ins. Co.*, 21 A. C. (D. C.) 325; *Brainard v. R. R.* 32 Vt. 297.

If the certificate is a specialty, general assumpsit may nevertheless be maintained thereon by virtue of No. 121, Acts 1896. This statute is remedial and should be liberally construed. The condition sought to be remedied exists in the case of a sealed policy as much as when the policy is open.

TYLER, J. This action was brought in general assumpsit based upon an endowment certificate or policy of life insurance, issued by the defendant to Peter Morrill and payable to

his sons, Peter and Joseph Morrill, upon proof of his death and of his compliance with the conditions named in the certificate. The defendant cravedoyer of the certificate, which was granted, and it then demurred to the declaration. The case is here upon exception to the overruling of the demurrer.

The action was brought under No. 121, Acts of 1896, the first section of which reads:

"In actions brought to recover on a fire, life or accident insurance policy, the general counts in assumpsit shall be a sufficient declaration, and no other or different one shall be required. The plea of non-assumpsit shall put in issue only the execution of the policy and the amount of damages sustained thereunder." The second section requires the plaintiff to file with the writ a specification giving the number of the policy, the date of the fire, death or accident, as the case may be, and the items of the policy involved in the claim.

1. The first question is whether the suit is properly brought in the name of the administratrix of the intestate. The undertaking was like that in *Tripp & Bailey v. Insurance Co.*, 55 Vt. 100, in that the consideration moved from the intestate and the promise was to him. Here the sons were not promisees but beneficiaries. In *Davenport, Admr. v. Insurance Co.*, 47 Vt. 528, the special count alleged that the promise was to the wife and children of the intestate, or their legal representatives, and the court held that no promise to the intestate was to be inferred. *Powers v. Insurance Co.*, 69 Vt. 494, 38 Atl. 148, was an action upon an insurance policy which provided that in case of loss the amount should be payable to the mortgagee, yet it was held that the action was properly brought by the mortgagor in his name because the consideration moved from him and the promise was made to him, though the insur-

ance was for the benefit of the mortgagee. If it is true, as the defendant contends, that this certificate is a specialty, then only the administratrix could bring the suit as the legal representative of the covenantee, although the covenant was for the benefit of third persons. *Fairchild v. Life Association*, 51 Vt. 613.

2. The defendant contends that the statute referred to does not apply to contracts under seal, and that if it does, the specification required by it is a sufficient proof of the instrument to entitle the defendant to over; that to simplify the pleadings the specification takes the place of a formal proof of the policy, if proof were necessary.

3. The plaintiff contends that the certificate is not a sealed instrument, in a legal sense, and if so, that it is the seal of the officers and not of the corporation. The paper is headed, "High Court Catholic Order of Foresters, Endowment Certificate," and recites that it "is issued to Peter Morrill, a member of St. Anthony Court No. 390, C. O. F.," etc. The final clause is: "IN WITNESS WHEREOF the High Court of the Catholic Order of Foresters has hereunto affixed its seal and caused this Certificate to be signed by its High Chief Ranger and attested and recorded by its High Secretary at Chicago, Ill., this seventh day of July A. D. 1899." It is signed by Thos. H. Cannon, High Chief Ranger, and attested by Theo. B. Thiele, High Secretary, and witnessed. A large, round, gilt wafer, partly covering green ribbons, is attached upon which is stamped the words: "HIGH COURT CATHOLIC ORDER OF FORESTERS, Faith, Hope, Charity." The wafer also bears the emblem of the cross and the date of the organization of the Order.

It is said that the same general principles in respect to seals apply to private and to municipal corporations. Dil. Munic. Cor. 190. A common or corporate seal was at common law the seal of a corporation by which the corporate body manifested its acts as such. 1 Black. Com. 471. It was said in *Beardsley v. Knight*, 4 Vt. 471, that corporations act by their seal, but it is now the rule in this country and in England that a corporation may make a contract without the use of a seal in all cases where this may be done by an individual. Morawetz Private Cor. 338. A corporation may adopt any seal it chooses, for the time, as well as a private person. *Bank of Middlebury v. R. R. Co.*, 30 Vt. 159. It is laid down in 1 Dillon, 190, that the corporate seal attached to an instrument, attested by the signatures of the proper officers, is *prima facie* but not conclusive evidence that it was lawfully placed there, and that the instrument is the act of the corporation.

In support of the contention that this is not a corporate seal, but the seal of the officers of the corporation, the plaintiff cites *Bank of the Metropolis v. Guttschlick*, 14 Pet. 19. But in that case the certificate was that the president and cashier, by order of the board of directors, "have hereunto set their hands and seals," while here it is certified that the corporation affixes its seal *unless* the "Catholic Order of Foresters" which makes the promise to pay the \$1,000, and the "High Court Catholic Order of Foresters" are different entities. The plaintiff cites in her brief what purports to be a section from the by-laws of the Catholic Order of Foresters, which provides of what officers the High Court shall consist, but the demurrer does not bring the constitution and by-laws of the corporation before us, and we cannot consider them. There is nothing in the certificate itself to indicate that the seal is not the seal of the corporation.

The corporation made the contract with the intestate and issued the certificate to him, and if it had another and different seal from the one attached to this paper, or if it had no corporate seal, it on this occasion and for this purpose adopted this as its corporate seal. *Bank of Middlebury v. R. R. Co.*, *supra*; *Cheney v. Gates*, 12 Vt. 565; *Keith v. Kibbe*, 10 Cush., p. 35; *Mill Dam Foundry v. Hovey*, 21 Pick., p. 428; *Jacksonville etc. R. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 Law. Ed. 515; *Phillips v. Coffee*, 17 Ill. 154; *Clark v. Farmer's Mfg. Co.*, 15 Wend. 256.

In the absence of evidence to the contrary it will be presumed that the seal affixed to the instrument is the proper and common seal of the corporation and regularly attached. See cases last above cited and 25 Am. & Eng. Ency. 79. The contention that the certificate was executed under seal is therefore sustained.

As the case stands it is immaterial whether oyer was demandable or not, for it was in fact demanded and given. This made the certificate a part of the declaration and gave the defendant a right to plead thereon. Com. Dig. tit. Pleading, p. 1; *Story v. Kimball*, 6 Vt. 541.

4. It is contended, however, that the Act of 1896 is applicable even though the certificate be a contract under seal. But we do not think this was within the contemplation of the law making power. The statute does not say that the action of assumpsit may be brought on all insurance policies whether under seal or not, and that the general counts shall be a sufficient declaration. It does not make the action of assumpsit appropriate when it is not so at common law. It merely makes the general counts sufficient in that action where a special declaration was before necessary. In other words, it does not purport to deal with the form of the action, but merely with the mode

of declaring. This seems to have been the view of the Court when the case of *Hersey v. Northern Assurance Co.*, 75 Vt. 441, 56 Atl. 95, was before it. There the question was whether the statute had changed the burden of proof, and the Court said that it construed the Act only as providing for a simpler mode of declaring. A minority of the judges are of opinion that the action should be maintained under the Act of 1896.

Pro forma judgment reversed, demurrer sustained, declaration adjudged insufficient and judgment for defendant to recover its costs.

HERMAN H. LEWIS v. JAMES F. ROBY.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, and POWERS, JJ.

Opinion filed January 19, 1907.

Husband and Wife—Action for Alienating Wife's Affection by Adultery—Evidence—Mitigation of Damages—Instructions—Husband's Prior Destruction of Wife's Affection—Effect—Petition for New Trial—Newly Discovered Evidence.

In an action for alienating the affections of plaintiff's wife by committing adultery with her, it was proper to refuse defendant's requested instruction to the jury that, if the affections of plaintiff's wife were not alienated by any act of defendant, plaintiff could not recover; and that, if plaintiff's wife's affections for him had been destroyed by his own conduct, there was nothing to be alienated by defendant's adultery with her.

The unhappy relations existing between plaintiff and his wife prior to the alienation, the want of affection between them, and plaintiff's negligence and immorality, go only in mitigation of damages, not in bar of the action.

The court correctly instructed the jury that the only question was whether defendant had committed adultery with plaintiff's wife; that plaintiff's neglect of his wife would not justify that act; that nothing would be a bar to that tort, except plaintiff's consent thereto.

If the verdict of a jury can be supported on any rational view of the evidence, it should stand. It never has been considered a sufficient ground for a new trial that the verdict is against the preponderance of the evidence, or that the court from a consideration and examination thereof might have arrived at a different result.

On a petition for a new trial on the ground of newly discovered evidence, brought by the defendant in an action for alienating the affections of the plaintiff's wife by committing adultery with her, affidavits accompanying the petition examined, and held insufficient, and that the petition be dismissed.

CASE for alienating the affections of the plaintiff's wife by committing adultery with her. Plea, the general issue. Trial by jury at the June Term, 1905, Windsor County, Haselton, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The defendant also brought a petition for a new trial, under V. S. 1662, to the May Term, 1906, of the Supreme Court for the county of Windsor, on the ground of newly discovered evidence. This petition was heard with defendant's exceptions at the October Term, 1906, on testimony taken and filed. The opinion fully states the case.

Davis & Davis, and *Fred H. Spaulding* for the defendant.

Newly discovered evidence, even on a point litigated at the trial, has been held sufficient to warrant a new trial. *Hurd v. Barber*, Brayt. 170; *State v. Cox*, Brayt. 171.

Contradictory evidence by the same witness at different times may be sufficient to warrant a new trial. *State v. Powers*, 72 Vt. 175; *State v. Fogg*, 74 Vt. 62, 67; *Durkee v. Fessenden*, Brayt. 167.

J. C. Enright, Fred C. Davis, and E. R. Buck for the plaintiff.

The law presumes that adultery has alienated a wife's affections from her husband. 9 Ency. of law (1st Ed.) 834, 835.

The newly discovered evidence revealed by the affidavits attached to the petition for a new trial, is cumulative evidence merely. *Dodge v. Kendall*, 4 Vt. 31; *Bullock v. Beach*, 3 Vt. 73; *Kirby v. Waterford*, 14 Vt. 414; *Bradish v. State*, 35 Vt. 452; *Knapp v. Fisher*, 49 Vt. 94.

TYLER, J. This action is brought for the alleged alienation by the defendant of the plaintiff's wife's affections by seducing and having sexual intercourse with her. The exceptions are to the refusal of the court to charge as the defendant requested and to some portions of the charge as given.

The defendant's 5th and 7th requests were as follows and were not complied with:

"If the jury find from the testimony that the affection or love of Effie E. Lewis was alienated from her husband by his own conduct, absence, neglect or other acts, and not by any act of defendant, the plaintiff cannot recover in this action."

"That if the jury find from the testimony that the plaintiff's acts, conduct, abuse or neglect contributed in bringing about any alienation of the affections of his wife (if such affections were in fact alienated), then the plaintiff cannot recover."

The defendant insists that if the affections of the plaintiff's wife were not alienated from him by any act of the defendant the plaintiff cannot recover; that if the wife's affection for her husband had been destroyed by his own conduct, there was nothing to be alienated by the defendant's adultery with her.

The defendant was not entitled to have the jury instructed as requested. The instruction was correct, that the only question was whether or not the defendant had sexual intercourse with Mrs. Lewis, as alleged; that the plaintiff's neglect of his wife would not justify the act, if committed; that nothing would then be a bar to an action for the tort except the plaintiff's consent thereto. This has long been the rule of the common law—some authorities say "from time immemorial." Blackstone says, Vol. 3 p. 139, that for criminal conversation with a man's wife, "considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband in an action of trespass." *Brown v. Spaulding*, 63 N. H. 622, 4 Atl. 394. *Weeden v. Timbrel*, 57 T. R. 357, cited by the defendant, supports this doctrine. 21 Cyc. 1626; 8 Am. & Eng. Ency., tit. Criminal conversation. The point made by the defendant's 5th and 7th requests has been before courts in other jurisdictions. In *Dallas v. Sellers*, 17 Ind. 479, it was held that though the wife has no affection for her husband, another person has no right to interfere to cut off all chance of its springing up in the future. This is the doctrine in *Prettyman v. Williamson*, 12 Del. 224, 39 Atl.

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731, and it was recognized in *Fratini v. Caslim*, 66 Vt. 273, 29 Atl. 252; *Cross v. Grant*, 62 N. H. 675.

Evidence of unhappy relations existing between husband and wife prior to the alienation, want of affection between them, the husband's negligence or immorality, can only be shown in mitigation of damages. The rule of law and the reason of it are well stated in the text in 8 Am. & Eng. Ency. 461: "Marriage is an institution of society having its foundation in a civil contract which imposes upon the parties certain duties and invests them with corresponding rights. A fundamental right which flows from this relation, and one which the well-being of society requires should be maintained inviolate, is that of exclusive marital intercourse which each acquires with the other. It follows, then, that whoever commits adultery with either of the parties, commits a trespass upon the rights of the other."

Judgment affirmed.

PETITION FOR NEW TRIAL.

The plaintiff based his right of action upon proof of the defendant's adultery with his wife, and for that proof he relied upon the testimony of his father, Henry Lewis, and that of Alexander Everett in respect to seeing the defendant and Mrs. Lewis on several occasions go to her room together and hearing their voices there. The witness Cole testified that he saw them on the evening of August 21, 1904, in the act of adultery, but the alleged act was after the suit was brought, and the evidence was offered and admitted, not as furnishing a ground of recovery, but to show an adulterous disposition between the parties and to make it probable that on the oc-

casions testified to by the other witnesses they were in Mrs. Lewis' room for a criminal purpose.

1. In support of the petition for a new trial the affidavits of Mrs. Lewis, George Ely and his wife are produced, which are in substance that Mrs. Lewis was not at her own house on the evening of August 21, that she went to the house of Mr. Ely before dark and remained there that night. Mrs. Lewis testified at the trial that Cole told her on an evening that some men were around her house and that she requested him to engage some one to assist him to watch and ascertain what it was for; that *she* discovered people around her house and that she went out and fired her revolver two or three times. In another connection she testified that she went to the Elys and stayed several nights and that she went "at the time they were watching," evidently meaning that night. Cole and the defendant testified that they watched the house for a while, then met at a point near the house, separated, and, as Roby testified, went to their respective homes. Cole testified that he went to Mrs. Lewis' house and from the porch, through an open window, saw Roby and Mrs. Lewis in criminal intercourse.

Witnesses are liable to be mistaken about dates. If on this occasion Mr. and Mrs. Ely chanced to be mistaken about Mrs. Lewis going there before dark, then she may have been at her own house for a while in the evening—as she testified she was and that she fired her revolver there—and have then gone to Ely's house and stayed that night. Mrs. Lewis does not say that she went to Ely's house before dark. Cole may have been mistaken about the day of the month and correct about the main facts in his testimony. The time was immaterial except as it affected the reliability of his testimony.

In a new trial this newly discovered evidence would fall short of proving an *alibi*.

2. The affidavit of Whitcomb is that Cole related to him the events of the evening in question and only stated that he went into Mrs. Lewis' house after the watching and found Roby sitting there with Mrs. Lewis, and that he spoke of no improper conduct between them. Cole makes affidavit that he related to Whitcomb all that he testified to at the trial, so the two affidavits are at variance. But if the affidavit of Whitcomb is literally true, there is not enough relative to the circumstances in which the incidents were related by Cole, nor of the relations existing between him and Whitcomb for us to decide that the story he then told was so contradictory of his testimony given at the trial that his testimony in another trial would be likely to be affected by it.

3. Henry Lewis testified at the trial that he had seen the defendant and Mrs. Lewis go to her room together twenty-five to thirty times. At the trial for divorce held at the next term of court he said ten or fifteen times. It was a loose way of testifying about so grave a charge as adultery, but the witness evidently meant to be understood that he had seen them go to her room together many times. There is not such a discrepancy in the testimony given by Lewis at the two trials as would warrant setting the verdict aside.

4. The fact that the plaintiff failed to obtain a bill of divorce from his wife for adultery with Roby does not help to support this petition. Each case was tried upon the evidence there presented. The only question now is whether the newly discovered evidence is sufficient to warrant the granting of a new trial. Mrs. Lewis and Roby denied the charge of adultery fully and explicitly. Mrs. Lewis testified upon every point in the case, including the alleged occurrences

of August 21, but her own testimony made it possible that Cole's testimony was true. His story, as we read it, seems improbable, but the jury heard and saw the witnesses upon this and all other branches of the case, and the question of fact was for their decision. They may have disbelieved Cole, whose testimony, as before stated, was introduced only to show the adulterous disposition of the parties, and found a verdict upon the other evidence.

The rule is: "If the verdict can be supported upon any rational view of the evidence, it should stand; and it never has been considered a sufficient ground for a new trial that the verdict is merely against a preponderance of the testimony, or that the court from a consideration and examination of the testimony might have arrived at a different result." See *Thayer v. Cen. Vt. R. R. Co.*, 60 Vt. 214, 13 Atl. 859, and cases cited in the opinion.

Petition denied.

AMERICAN CAN COMPANY v. GUSTAVE H. GRIMM.

October Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, and
MILES, JJ.

Opinion filed January 19, 1907.

Assumpsit—Reference After General Issue Pleaded—Subsequent Declaration in Offset—Whether Covered by Reference—V. S. 1437, 1156.

Where a case in assumpsit on promissory notes, after defendant had pleaded the general issue only, was referred to be tried according

to law, and at a subsequent term, pending a continuance by the referee after a partial hearing before him, defendant, by leave of court, filed a declaration in offset based upon a claim independent of plaintiff's cause of action, and raising issues entitling the parties to a trial by jury, it was error to hold, against plaintiff's objection, that those issues went to the referee under the general reference.

GENERAL AND SPECIAL ASSUMPSIT, Rutland County. At the March Term, 1905, after the defendant had pleaded the general issue only, the case was referred to be tried according to law. Pending a continuance by the referee after a partial hearing before him, and at the March Term, 1906, *Powers, J.*, presiding, the defendant by leave of court filed a declaration in offset, and the court held, against the plaintiff's objection, that the issues raised thereby went to the referee under the general reference, to which holding the plaintiff excepted. Case passed to the Supreme Court before further hearing on the merits.

E. H. O'Brien, and *O. M. Barber* for the plaintiff.

The issues raised by the declaration in offset were such as entitled the parties to a jury trial, hence it was error to force plaintiff to try them before the referee. V. S. 1437 authorizes compulsory reference only when the issues are not cognizable by a jury. *Rice v. Clark*, 8 Vt. 104; *Knapp v. Fisher*, 49 Vt. 94; *Jeffreys v. Hazen*, 69 Vt. 456; *Saunders v. Fire District*, 70 Vt. 561.

When a reference of an issue cognizable by jury is made, the court may not revoke or enlarge the same without the consent of both parties unless the referee fails to comply with the law as to making and filing his report, and a party cannot revoke the rule until the time for making the report has ex-

pired. *Baxter v. Thompson*, 25 Vt. 505; *Lazell v. Houghton*, 32 Vt. 579.

Butler & Moloney, and *P. M. Meldon* for the defendant.

A reference may be revoked, as a matter of discretion, at the request of either party. A reference is not an arbitration, as was held before the statute. *Craigie v. Hall & Farr*, 73 Vt. 106; *Hulbert v. Miller*, 72 Vt. 110.

TYLER, J. The declaration consists of the common counts in assumpsit, and two special counts declaring upon two certain promissory notes made by the defendant and payable to the plaintiff. The plaintiff filed a specification with the writ, stating that it would claim judgment only upon the two notes, both of which are dated July 20, 1902, one payable three months from date in the sum of \$454.50, and the other in four months in the sum of \$463.30; plea, the general issue. At the March term, 1905, of Rutland County Court the case was referred to be tried according to law. The referee met the parties for trial on February 20, 1906, when the plaintiff introduced all its evidence and rested. The defendant not being ready to proceed with the defence moved for and was granted a continuance until February 28, when he asked leave to file a plea and declaration in offset. The referee held that he had not authority to grant such leave, but continued the trial until a day past the next term of the county court to enable the defendant to make his motion in court. At that term the court on the defendant's motion granted him leave to file an amended plea or declaration in offset, and held that the issues thereby raised went to the referee under the general reference. To this holding of the court the plaintiff excepted.

The case could not have been referred under V. S. 1437 without the agreement of the parties. The language of the statute is, "The supreme or county court may, * * * by agreement of parties appoint such referees in any cause pending in such court." This reference was by agreement of the parties, and the question is whether the defendant, under V. S. 1156, had a right to file a plea in offset and have the subject-matter thereof tried by the referee. That section provides that if the plaintiff, in an action founded on contract, express or implied, is indebted to the defendant in such action, on contract express or implied, the defendant, after pleading the general issue or confessing the plaintiff's cause of action, may plead such indebtedness in offset. Here the defendant, after pleading the general issue, for further plea said that the plaintiff was indebted to him in a large sum in damages occasioned by the plaintiff's breach of a certain contract that it had made with the defendant, which damages the defendant prayed might be offset against the demand of the plaintiff.

But the exceptions state that the issues raised by the defendant's plea in offset entitled the parties to a trial by jury. They further state that the plea in offset was founded upon a separate cause of action, independent of that upon which the plaintiff's cause of action rested, and that it introduced into the case an entirely new and distinct subject-matter of litigation, which was the fact for anything that appears in the plea.

The exception must be sustained. When the reference was made the case stood for trial upon the declaration and the plea of the general issue. The plea in offset that was subsequently filed presented a new subject-matter of litigation,

independent of that upon which the declaration was founded. It raised issues that were triable by jury, and the plaintiff could not be deprived of the right of such trial without its consent. This holding is in accordance with the reasoning in *Fulton v. Wiley*, 32 Vt. 762, and in *Cook v. Carpenter*, 34 Vt. 121.

The order of the County Court is reversed and cause remanded.

GEORGE W. CLEVELAND v. TOWN OF WASHINGTON.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 28, 1907.

Towns—Bridges—Insufficiency—Personal Injuries—Notice to Selectmen—Construction—"Culvert or Bridge"—Trial by Jury—Neither Party Desiring to go to Jury—Effect—Contributory Negligence—Charge—V. S. 3490.

In V. S. 3490, which gives an action against a town for damage caused by reason of the insufficiency of any "bridge or culvert," the word "or" does not co-ordinate "bridge" and "culvert" and make each term connote the same, but connects two words denoting distinct objects of the same class.

Where neither party desires to go to the jury upon an issue of fact made by conflicting evidence in the course of a trial by jury, that issue is thereby submitted to the court, and its holding thereon is conclusive.

In an action against a town for injury caused by reason of the alleged insufficiency of a bridge, plaintiff's notice to the selectmen designated the bridge as the *first* bridge beyond a certain residence, and it

appeared that the bridge on which the injury was received was of 15 feet span, 17 feet long, and covered with plank; that between it and said residence were two wooden culverts of less than 18 inches span, about 3 feet long, and covered with plank. Though each side gave evidence as to the material, size, and structure of the culverts, and as to the amount of water that flowed through them, there was not much conflict in that evidence, except as to the amount of water. *Held*, that it was a question of fact whether the bridge in question was the "first bridge" beyond said residence, as stated in the notice, or the "third bridge," as claimed by defendant; and that, as neither party desired to go to the jury on that issue, the holding of the court that the notice correctly designated the bridge as the "first bridge" beyond said residence was conclusive.

A traveller has a right to act upon the assumption that the town has done its duty to maintain its highway bridges in good and sufficient repair.

In an action against a town for injury caused by reason of the alleged insufficiency of a highway bridge, evidence considered, and *held* that plaintiff was not, as matter of law, guilty of contributory negligence.

In an action against a town for injury to plaintiff by being thrown from his wagon in consequence of his horse breaking through an alleged insufficient plank in a bridge, defendant did not claim that plaintiff's negligence contributed to the breaking of the plank, but only to his being thrown from his wagon. The court in its instructions to the jury referred to the breaking of the plank as an "accident," without alluding to contributory negligence, but added, "Now further than that, consider the question whether the plaintiff was in the exercise of due care, that is, whether his failure to exercise due care, if you find that he did fail, contributed to the accident, the accident that resulted in his injury." *Held*, that the court sufficiently charged that, if plaintiff's negligence contributed to the happening of the particular injuries he received, he could not recover.

CASE for negligence. Plea, the general issue. Trial by jury at the June Term, 1905, Orange County, *Powers, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted. The opinion fully states the case.

R. M. Harvey, and *Hale K. Darling* for the defendant.

Unless the word "bridge" is clearly limited by statute, it means "any structure by which a highway is carried over a place." 5 Cyc. 1052, Note 1; *Whitall v. Freeholders*, 40 N. J. L. 302; *State v. Gorham*, 37 Me. 451; *Shear. & Redf., Neg.* (5th ed.) 390.

The notice must be so certain that an officer of the town, with the aid of the notice, could readily identify the place where the injury occurred. *Holcomb v. Danby*, 51 Vt. 428; *Law v. Fairfield*, 46 Vt. 425; *Reed v. Calais*, 48 Vt. 7; *Bean v. Concord*, 48 Vt. 30.

A verdict should have been ordered for defendant. Plaintiff had no right to surrender control over his horse, in blind reliance on the presumption that the town had done its duty. *Carter v. C. V. R. R.*, 72 Vt. 190; *R. R. v. Houston*, 95 U. S. 697; *Wharton, Neg.* §384.

John W. Gordon, and *George L. Stow* for the plaintiff.

Plaintiff's notice to the selectmen was sufficient; and its construction was wholly for the court. *Gove v. Downs*, 59 Vt. 139; *Rowell v. Fuller*, 59 Vt. 688; *Currier v. Robinson's Est.* 61 Vt. 196; *Wason v. Rowe*, 16 Vt. 525; *Mixer v. Williams*, 17 Vt. 457; *Collamer v. Langdon*, 29 Vt. 32; *Driggs v. Burton*, 44 Vt. 124; *Chase v. Martin*, 6 N. E. Rep. 837; *Barton v. Montpelier*, 30 Vt. 650; *Lawton v. Weathersfield*, 74 Vt. 41; *Ranney v. Sheffield*, 49 Vt. 191.

ROWELL, C. J. This is case for injury on a bridge. The notice designates the place of injury as "on the first bridge in the highway beyond the residence of C. J. Kingsbury" as you go westerly toward Gilbert O. Smith's place. It appeared

that there were two small wooden culverts of less than eighteen inches span, covered with plank, between Kingsbury's and the bridge on which the injury was received. The planking of the first culvert beyond Kingsbury's was not over three feet wide, and that of the second culvert averaged about three and a half feet wide. The bridge in question was also of wood, and covered with plank. Its span was fifteen feet, and its length, seventeen feet. The defendant objected that the notice was insufficient, for that said bridge was not the *first* bridge beyond Kingsbury's, but the *third* bridge. Both sides gave evidence as to the material, size, and structure of these culverts, and as to the amount of water that passed through them. There was not much conflict in this evidence, except as to the amount of water. The court announced that it thought the notice legally sufficient, but offered to submit the question with instructions, whether there was any bridge between Kingsbury's and the one on which the accident happened, if the plaintiff desired. As neither party expressed a desire to go to the jury on the question, the court understood that both claimed it to be a question of law, and thereupon held the notice legally sufficient. This ended the question, if it involved an element of fact. This comes within the principle of *Mascott v. Ins. Co.* 69 Vt. 124, 37 Atl. 255. But the defendant says it did not, but was purely a question of law, for that the words "bridge" and "culvert," as used in the statute, mean the same thing, and cannot be differentiated by testimony nor construction; and that the court should have so ruled, and held the notice insufficient. But we do not think so. The statute gives an action for damages caused by reason of the insufficiency of "any bridge or culvert" that the town is liable to keep in repair. Now the word *or* may be used to join as

alternatives, terms expressing different things, as well as to join different terms expressing the same thing; and it is considered that the former is its use here, so that it does not co-ordinate "bridge" and "culvert," and make each in turn the equivalent of the other, but specializes one to one meaning and the other to another meaning, thus making the statute mean as though it read, "either a bridge or a culvert," in which case we should clearly have two things, though of the same class.

This construction is supported by the history of legislation on this subject. Down to 1839 the words of the statute were, "any highway or public bridge." In the Revision of 1839 the words were, "any highway or bridge." These words were retained till 1880, when No. 26 of the Acts of that year repealed the provisions then existing relating to the liability of towns for damage on highways and bridges, except as to bridges of not less than eight feet span, and gave an action for damages on such bridges only. This provision became sec. 3111 of the General Statutes of that year. But that section was amended by No. 13 of the Acts of 1882, by giving an action for damages on "any bridge, culvert, or sluice"; and said section, as thus amended, was again amended in 1884 by declaring that the word "sluice," as therein used, should not be construed to include or mean gutters and streams not designed to be closed or covered. The word "sluice" was left out of the revision of 1894, because the revisers thought, as they said in their report to the Legislature, that the word "culvert" covered all cases, and that the word "sluice," as qualified by the act of 1884, added nothing to the meaning of the section.

The statute under which the revisers were appointed, authorized them to "reject superfluous words"; and when they

were considering the phrase, "any bridge, culvert, or sluice," to see if it contained any such words, it is fair to suppose that if they thought the word "bridge" covered all cases, and that the word "culvert" added nothing to the meaning, they would have left that out also. And moreover, this report served to call the attention of the Legislature to this phrase, and yet the word "culvert" was retained. And it is retained in the revision of 1906, although those revisers had the same authority of rejection. From all which it would seem clear enough that the construction we adopt is the correct construction, and it is matter of common knowledge that it agrees with the popular understanding.

It appeared from the plaintiff's own testimony that his horse was trotting as it went onto the bridge; that six or eight rods above the bridge, he crossed his legs, put the reins between them, and with both hands was preparing to light his pipe, and did not look at the bridge as he approached it, to see whether there was a hole in it or not. It appeared that there was no hole in it then, but that the horse broke through a rotten plank, and was thrown, and that the plaintiff was thrown out over the near forward wheel onto the bridge and hurt. The plaintiff testified that he told the selectmen that if he had had hold of the reins and both feet on the bottom of the wagon, he should have been thrown over the dasher onto the horse. The defendant moved for a verdict, for that the plaintiff's own evidence showed that he was guilty of contributory negligence. But the motion was properly overruled, for the law did not impute contributory negligence to him in the circumstances, especially as he had a right to presume that the town had done its duty.

The defendant excepted to the failure of the court to charge that if the plaintiff's negligence contributed to the

happening of the particular injuries he received, he could not recover. But we think the court did so charge, and in a way that the jury was not misled. The defendant did not claim on trial that the plaintiff's negligence contributed to the breaking of the plank by the horse, but only to his being thrown out as he was. So the court put the question of breaking the plank to the jury, calling it an accident, without alluding to contributory negligence. Then the court went on to say: "Now, further than that, consider the question whether the plaintiff was in the exercise of due care, that is, whether his failure to exercise due care, if you find that he did fail, contributed to the accident—the accident that resulted in his injury." The exception, therefore, is not sustained.

Judgment affirmed.

STATE OF VERMONT, EX REL. CHARLES A. PHELPS v. S. HOL-
LISTER JACKSON.

January Term, 1906.

Present: ROWELL, C. J., TYLER, MUNSON, WATSON, HASELTON, POWERS,
and MILES, JJ.

Opinion filed January 24, 1907.

*Quo Warranto to Oust From Office of State's Attorney—
Residence and Domicile—Citizenship—Evidence—Hear-
say—Declarations—Presumptions—American Citizen
Born in Canada—Requisite Choice at Majority—Act of
Congress of 1855—Construction.*

Where it appears only that a person is a resident of this State, he will be presumed to be also a citizen thereof.

But where it appears that a resident of this State was born in a foreign country, it will be presumed that he is still a citizen of that country, notwithstanding his residence here.

The declarations of a deceased person who was born an American citizen, made while he was residing abroad, evincing an intention to adhere to the allegiance of his birth, are admissible upon the question of his then citizenship.

When a fact that in its nature is continuous, such as allegiance, citizenship, or residence in a certain place, is proved to have existed, the general rule is that it is presumed to continue till the contrary is shown.

Citizenship and domicile are not identical, nor does either necessarily control the other; and a mere change of domicile does not effect a change of allegiance,

To overcome the presumption of the continuance of an allegiance proved to have existed at a certain time, evidence must be adduced of an actual removal or continued residence abroad, with a fixed purpose to terminate the former allegiance.

A party cannot be heard to complain because hearsay evidence that he put into the case is used against him; and both that evidence and such hearsay as was received without objection, is properly weighed and considered by the trier.

A person born in Massachusetts in 1771, by continuing to reside there till 1807 and giving his allegiance to the United States after the Declaration of Independence, became an American citizen; and his mere subsequent removal to Canada in no way affected that status.

On *quo warranto* to oust the respondent from the office of State's Attorney, on the alleged ground that he is a British subject, it appeared that the respondent's great-grandfather was born in Petersham, Mass., and continued to reside there as late as December, 1807, and that the earliest date shown of his subsequent removal to Canada was in 1812. *Held*, that he will be presumed to have still resided in said Petersham in March, 1810, when the respondent's grandfather was born, and that there is no evidence in the case sufficient to overcome that presumption.

Since the grandfather was born an American citizen, neither his removal to Canada during his minority, nor any act of his father,

could affect that status, which would abide with him till he himself, after attaining his majority, by his own voluntary act did something to legally divest himself of it.

The respondent's grandfather while a minor, removed from the United States, where he was born an American citizen in 1810, to Canada, where he resided during the rest of his life. He was married there in 1833, and a son, the respondent's father, was born to him there in 1838. *Held*, that the respondent's father did not come within the terms of the Act of Congress of 1802, providing that "The children of persons who *now are* or *have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States," etc.

On *quo warranto* to oust the respondent from the office of State's Attorney on the alleged ground that he is a British subject, wherein it appeared that his grandfather while a minor, removed from the United States, where he was born an American citizen in 1810, to Canada, where he resided during the rest of his life; that he became of age in 1831, was married in Canada in 1833, and a son, the respondent's father, was born to him there in 1838; evidence considered, and *held*, that there is no evidence in the case inconsistent with the presumed continuance of the grandfather's original citizenship from the date of his majority to the birth of the respondent's father, who was, therefore, made an American citizen by the Act of Congress of 1855, which provides that, "All children heretofore born or hereafter born out of the limits of the jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States."

Lyndon v. Danville, 28 Vt. 809, and *Albany v. Derby*, 30 Vt. 718, distinguished and explained.

A person who lived in the United States only as a minor and as a member of his father's family, "resided" there within the meaning of the proviso of the Act of Congress of 1855, that "the right of citizenship shall not extend to children whose fathers never *resided* in the United States."

The citizenship thus acquired by the respondent's father by virtue of the Act of Congress of 1855, required an election on his part

upon attaining his majority, or within a reasonable time thereafter, whether he would preserve that status, or become a Canadian citizen; which election when once made would be binding upon him and the country of his choice.

Evidence examined, and *held* that the respondent's father, by coming to the United States when a minor and completing his education here, by residing here several years after attaining his majority, by taking the freeman's oath and paying taxes here, and by other acts, elected to preserve his status as an American citizen, and that, therefore, the respondent, who was born in Canada in 1875, was, by virtue of the Act of Congress of 1855, also born into that kind of American citizenship which required him to elect, upon attaining his majority, whether he would preserve that status, or become a Canadian citizen; and that he did this and chose American citizenship by coming to Vermont while a minor permanently to reside, and by, upon reaching his majority, completing his election by taking the oath required by law and securing his enrollment as a voter in Barre, and by exercising and enjoying all the rights and duties of citizenship from that time till his election as State's Attorney, which office he was, therefore, legally qualified to hold.

QUO WARRANTO brought, under V. S. Chap. 82, to the Supreme Court for Washington County at its October Term, 1905, and heard at the January Term, 1906, upon evidence taken and filed. The complaint alleged that the respondent, as State's Attorney of Washington County, to which office he had been duly elected, had filed with the clerk of Washington County Court an information charging the relator with keeping a bucket shop, upon which information the relator had been arrested and forced to give bail, and that the case was still pending in court; that the respondent is in fact a British subject, born in Canada, and therefore unlawfully exercising the duties of said office. The opinion fully states the case.

May & Hill, and *R. A. Hoar* for the relator.

The relator can only raise the question of the respondent's citizenship by quo warranto. *McGregor v. Balch*, 14 Vt. 428; *Fancher v. Stevens*, 61 Vt. 616; 23 Am. & Eng. Enc. Law 630; 23 Wend. 490; 122 Mass. 145; 133 N. Y. 569; High's Ex. Remedies, §624; Spelling Ex. Remedies §1788; *State v. McGearry*, 69 Vt. 461; *Boyd v. Nebraska*, 143 U. S. 178; *State v. Vail*, 53 Mo. 97; *State v. Lane*, 16 R. I. 620; *State v. Horne*, 42 N. J. L. 435; *Chandler v. Walker*, 68 Ga. 681; *State v. Martin*, 46 Conn. 497; *People v. London*, 13 Colo. 303.

At common law, an alien has no political rights. *Walther v. Rabott*, 30 Cal. 185; 2 Am. & Eng. Enc. Law (2d ed.) 68; Throop Public Officer, § 72; *State v. Smith*, 14 Wis. 497.

Horatio Nelson Jackson, the respondent's grandfather, never resided in the United States, within the meaning of the Act of Congress of 1855, since he never lived there except while a minor and as a member of his father's family. *Lyndon v. Danville*, 28 Vt. 809; *Albany v. Derby*, 30 Vt. 718; *Murray v. Betsey*, 2 Cranch 119; *Juando v. Taylor*, 2 Paine 652; Webster's Citizenship, p. 71, 76; *Mansfield v. Tunbridge*, 62 Vt. 455; *People v. Platt*, 117 N. Y. 159.

John W. Gordon, *W. A. Lord*, and *S. Hollister Jackson* for the respondent.

Children born in a foreign country of American parents who resided there, but never renounced their American citizenship, are citizens of the United States. *Ware v. Wisner*, 50 Fed. 310; Van Dyne, Citizenship, p. 34; *State v. Adams*, 45 Iowa 99; *Calais v. Marshfield*, 30 Me. 511; *Peck v. Young*, 26 Wend. 613; *Inglis v. Trustees Sailors' Snug Harbor*, 3 Pet. 99; *Ludlam v. Ludlam*, 26 N. Y. 356; 2 Kent's Com. 49, note a; Hallock on International Law, ch. 29, §3.

A citizen cannot renounce his allegiance to the United States without its permission, declared by law; and if there is no existing regulation in the case, the rule of the English Common Law is applicable. *Comitas v. Parkerson*, 56 Fed. 559; Blackstone Com. 370; 1 East Pleas of the Crown 81; *Shanks v. Dupont*, 3 Pet. 243.

A father cannot by any act of his deprive his son of the status of American citizenship. *Van Dyne, Citizenship*, 43, 48.

POWERS, J. This is a petition for a writ of *quo warranto* to test the right of the respondent to hold the office of state's attorney of Washington County. As the case is presented, the only question for our determination is, was Mr. Jackson a citizen of the United States at the time of his election to the office in 1904?

It is said that we were not in harmony with the authorities when we held in *State ex rel. v. Danforth*, 28 Vt. 594, that in these proceedings persons in possession of an office are presumed to be regularly elected and entitled to hold until the contrary appears; and that the true rule is that in such cases the burden is on the respondent to show legal title to the office. *State v. Harris*, (Ark.) 36 Am. Dec. 460; 3 Elliott Ev. § 1930; 2 Spelling Ex. Rem. §1878; *State ex rel. v. Powers*, 136 Mo. 376, Bailey Onus Prob. 438. However this may be, we regard it of no importance in this case, as the citizenship of the respondent is presumed. This presumption arises from the mere fact of his residence here. *Devanney v. Hanson*, (W. Va.) 53, S. E. 603; *State v. Blackmo*, 6 Blackf. (Ind.) 488; *Buckley v. McDonald*, (Mont.) 84 Pac. 1114; 7 Cyc. 147. It was this rule which Judge Redfield had in mind when he said in *Blood v. Crandall*, 28 Vt.

at p. 400, that "the general presumption is in favor of citizenship."

This presumption, however, avails the respondent in this case nothing, for it is immediately met with proof of his foreign birth; from which fact arises a presumption that he is a citizen of the country of his birth and not of his residence,—which requires him to show that his citizenship is not controlled by that fact. *Quimby v. Duncan*, 4 Har. (Del.) 383; *Minneapolis v. Renn*, 56 Fed. Rep. 576; 7 Cyc. 147.

These presumptions must be carried along and weighed and considered in determining the facts upon which our decision is based.

The Rev. John Jackson, the great-grandfather of the respondent, was born at Petersham, Mass., July 2, 1771, and continued to reside in that State until some time after December 21, 1807,—the date of the birth of his daughter, Sarah Saphronia. His citizenship is questioned by the relator's counsel, but not seriously, we think, for, though born a British subject, his continued residence in this country after the Declaration of Independence, giving allegiance to the new government, establishes his American citizenship. No doubt he had the right to elect whether he would retain his native allegiance to the British crown, or become a citizen of this country. But nothing appears to indicate that he elected to adhere to the Crown, so he is to be deemed to be an American citizen. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Young v. Peck*, 21 Wend. 389; *Moore v. Wilson*, 18 Tenn. 406; *Calais v. Marshfield*, 30 Me. 511. On this point there is no conflict between the English and American authorities, except that we date the separation of the two countries (the date to which this right of election has reference) from July 4, 1776, while in England it is not considered to have taken

place until the treaty of peace in 1783. *Inglis v. Sailor's Snug Harbor, supra*; *Doe v. Acklam*, 2 B. & C. 779. Nor did John Jackson's mere subsequent removal to Canada affect the citizenship so established. *Ainslee v. Martin*, 9 Mass. 454; *Campbell v. Wallace*, (N. H.) 37 Am. Dec. 219; *Quimby v. Duncan, supra*; *Minneapolis v. Renn, supra*; *State v. Adams*, (Ia.) 24 Am. Rep. 760; *Hauenstein v. Lymham*, 100 U. S. 483.

While John Jackson was residing at Petersham, his son, Horatio Nelson Jackson, was born there March 5, 1810. The date of this birth is conceded, but it is insisted on behalf of the relator that there is no legitimate evidence before us that Horatio Nelson was born at Petersham, and that the circumstances, historical and otherwise, show that he must have been born in Canada after his father, John Jackson, moved there; and that the only evidence of the place of birth rests in a family tradition, which is merely hearsay and inadmissible to prove the fact. It appears by the record that a part of the evidence now objected to as hearsay was put into the case by the relator himself, and as to such he cannot now be heard to complain. *Davis v. Streeter*, 75 Vt. 214, 54 Atl. 185. Some further part of the same came in without objection, and is properly before us. So without deciding the question of its admissibility, we reject the tradition, except so far as it came into the case as aforesaid. Indeed, if we were to reject all of which the relator now complains, our finding would be the same. For it is conceded that John Jackson was residing in Petersham as late as December, 1807, and the presumption is that he continued to reside there until the contrary appears. It was said by Judge Peck in *Farr's Admr. v. Payne*, 40 Vt. 615, that "where a fact is proved which in its nature is continuous, the general rule is that it is presumed to exist till the contrary is

proved." Residence is a fact of this character, and one to which this rule applies. Accordingly in *Rixford v. Miller*, 49 Vt. 319, it was held that when the residence of the defendants in that case was once established in the State of New York, it was presumed to continue there until the contrary was shown. These cases were approved and the principle recognized and applied in *Sowles v. Carr*, 69 Vt. 414, 38 Atl. 77. Judge Brewer says in *Keith v. Steller*, 25 Kan. 100, that it is a familiar rule that residence once established, is presumed to continue until it is shown to have been changed. To the same effect are *Price v. Price*, 156 Pa. St. 617, *Kilburn v. Bennett*, 3 Metc. 199; *Ripley v. Hebron*, 60 Me. 379; *Bank v. Bank*, 87 Ia. 479; *Nixon v. Palmer*, 10 Barb. 175; *Greenfield v. Camden*, 74 Me. 56.

Rejecting the tradition referred to, there is nothing in the case to show John Jackson residing in Canada until several years after the birth of Horatio Nelson. In the cross-examination of Dr. J. Henry Jackson by relator's counsel, it appeared that John Jackson went to Canada in 1812, but this is the earliest date of his removal there shown by the record,—excluding the tradition referred to. Samuel N. Jackson, son of Horatio Nelson, and father of the respondent, while the relator's witness, in response to orator's counsel testified as follows:

Q. "Your father was also born in Canada?" A. "No sir, in the United States, in Massachusetts." The relator seeks to avoid responsibility for this statement on the ground that when the question was asked he supposed that the witness had reliable data or knowledge on which to predicate his answer; whereas in fact it turns out that he had no information save the family tradition. The relator's position is untenable. He would hardly be justified in assuming that the

witness had *personal* knowledge of the birthplace of his father. He must have understood that he would testify from information acquired from some person or some source; and he should have inquired about the sources of his information, if he did not want to take a chance on his answer. Moreover, Dr. J. Henry Jackson, in answer to relator's counsel, testified that he himself found a record of the birth of Horatio Nelson in the town clerk's office in Petersham, when looking up the genealogy of the family some fifteen years ago. Such a record cannot now be found, but considering the early time to which the investigation relates, the laxity which prevailed in such matters at that time, and the present condition of the records referred to as shown by the testimony of the respondent and the preface to the volume of vital statistics of that town, this is not a matter of much surprise.

Our attention is called to many circumstances which the relator elaims tend to show that Horatio Nelson must have been born in Canada. One of those vigorously urged upon our consideration is the fact that the first three sons of John Jackson were named after Presidents of the United States; while the fourth was named after a British Admiral, Horatio Nelson, and the fifth after a British poet, Joseph Addison. We attach but little importance to this. John Adams Jackson was born in 1800 while John Adams was President. But James Madison Jackson was born in 1804,—five years before James Madison was President. George Washington Jackson was born in 1805,—eight years after George Washington's term as President had expired, several years after his death and during the second term of Thomas Jefferson.

None of the circumstances alluded to, nor all of them together are sufficient to meet the presumption and evidence showing the fact to be as claimed by the respondent. We have no hesitation, therefore, in finding that Horatio Nelson Jackson was born in Massachusetts. And this being so he was born an American citizen, and his removal to Canada during his minority would not divest him of his character as such, nor could his father, John Jackson, do anything after his birth to deprive him of it. Van Dyne Cit. 43 (Hernandez's case). His American citizenship attended him, abided with him and was available to him, until he himself, after attaining his majority, by his own voluntary act, did something to legally divest himself of it. He was not required to elect his allegiance, he was born into it.

In this view of the matter, the subsequent life history of the Rev. John Jackson is of no further interest to us in this discussion, and he passes out of the case.

Horatio Nelson Jackson resided in Canada practically all of the time after his removal there until his death. He spent some portions of the later years of his life in the states, but it is not claimed that he established a permanent residence here. He became of age in 1831, married in 1833, and a son was born to him at Brome, P. Q., in 1838. This son is Samuel Nelson Jackson, father of the respondent. The time, then, which elapsed between the date when Horatio Nelson attained his majority and the birth of Samuel Nelson was about seven years. It is to this interval of time that we now direct our attention, for during his minority Horatio Nelson was not competent to expatriate himself,—*Ludlam v. Ludlam*, 26 N. Y. 356—and the status of the son Samuel became fixed at the date of his birth. The point of our enquiry will be to ascertain whether Horatio Nelson retained the citizenship of his

birth until the birth of the son, Samuel Nelson; for if he did, Samuel Nelson was an American citizen at birth. But if Horatio Nelson did anything which amounted to expatriating himself after he became of age and before the birth of the son, it would prevent the son from acquiring American citizenship from the father.

When Horatio Nelson became of age, the act of Congress of 1802, (2 Stat. at L. 155) was in force. This act provided that "the children of persons who *now are or have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States. Provided that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

The respondent claims that Samuel Nelson's status as a citizen of the United States is fixed by this act which remained in force until 1855. But this act did not include Samuel Nelson. It only applied to persons whose parents were citizens in 1802, or had been previous to that time. Samuel Nelson's father was not born until 1810, and so did not come within its terms. Yet this law remained on the statute books with its limitations and defects apparently undiscovered until Mr. Horace Binney published in the American Law Register, Vol. 2, p. 193, a vigorous article on the subject which induced the passage of the Act of 1855, (Comp. St. 1901, 1268) which reads as follows: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the right of citizenship shall not descend to children whose fathers never resided in the United States."

This act took effect during the minority of Samuel Nelson and applies to him if the proof brings him within its terms.

So it is that the first question to determine is, was Horatio Nelson a citizen in 1838 when Samuel Nelson was born?

Citizenship and domicile are not the same thing. Neither necessarily controls the other. The matter of domicile is ordinarily of private concern only. Citizenship is a matter of public concern,—a matter over which the government assumes, in some degree, control. It is in its nature continuous, and once established, it is presumed to continue until the contrary is shown. *Minneapolis v. Renn*, *supra*. A change of domicile merely does not, as we have seen, effect a change of allegiance. To overcome the presumption of the continuance of the allegiance once established evidence of an actual removal or a continued residence abroad with a fixed purpose to throw off and terminate the former allegiance must be produced. Thus in *Quimby v. Duncan*, 4 Har. (Del.) 385, a case involving the question whether one Hyatt was a citizen of that state, he having left the state at a certain time since when he had not been heard of, it is said that "a man is to be regarded as a citizen of his native state until it can be shown that he has changed this relation by leaving *animo manendi* or by acquiring a citizenship elsewhere. And this is to be not merely by a change of habitancy or residence, but by a change of citizenship." In *Beavers v. Smith*, 11 Ala. 20, a case involving the citizenship of the widow of one who had removed to the Republic of Texas, it is said "* * * it is very certain that the mere removal of a citizen of the United States to a foreign country does not work a forfeiture of his political privileges as a citizen of the United States. He may by the removal owe a local, temporary allegiance to the sov-

ereign of his domicile, but neither in England nor the United States would a sojourn of any length of time, entitle such a resident to the political rights of a natural born subject or citizen. * * * Her residence there is entirely consistent with the retention of her political rights derived from her birth in South Carolina, and until some further act is shown, inconsistent with the future assertion of this right, it appears to us illogical and unwarrantable to deduce such an inference from an act so equivocal as residence merely."

Hauenstein v. Lynham, 100 U. S. 483, involved the right of the heirs of Hauenstein, who died in Richmond, Va., leaving estate there, to inherit his property which was under an inquisition of escheat. The Court said: "The plaintiffs in error are all citizens of Switzerland. The deceased was also a citizen of that country, and removed thence to Virginia where he lived and acquired the property to which the controversy relates and where he died. The validity of his title is not questioned. There is no proof that he denationalized himself or ceased to be a citizen and subject of Switzerland. His original citizenship is therefore, to be presumed to have continued." Best on Presumptions, 186. According to the record his domicile, not his citizenship, was changed." *State v. Adams*, 45 Ia. 99, 24 Am. Rep. 760, was an action to test the right of the defendant to hold the office of mayor of Aroca. The defendant's grandfather was born in Connecticut, removed to Canada in 1790, with intention of making his permanent domicile there, and remained until his death. The defendant's father was born in Canada and served in the army under compulsion. The defendant was born in Canada and moved to Iowa. It was held that the defendant was a citizen of the United States and in the absence of evidence it would not be

presumed that the grandfather intended to renounce his citizenship.

In *Ware v. Wisner*, 50 Fed. 310, it was held that a son born in Canada of American parents who resided there, but who had never renounced their citizenship, was a citizen of the United States, though both father and son had engaged in business there and several times voted upon their property qualifications, as provided by law.

There is no evidence in this case inconsistent with a continuance of Horatio Nelson's original citizenship during his residence in Canada from the time he came of age to the birth of Samuel Nelson. We are told that he voted in Canada, but whether he did so before 1838 is left to conjecture. It is shown that he held title to real estate there just before the birth of Samuel Nelson. The deed itself is a quit claim of 72 acres with buildings and improvements, but the character of the property and whether he resided upon it or what he did with it, does not satisfactorily appear. He was appointed a justice of the peace, but not until after the date in question,—1838.

On the contrary, the evidence of the respondent discloses that by his statements,—and these were admissible, *Baptiste v. De Volunbun*, 5 Har. & J. (Md.) 86—he always claimed to be an American citizen and many circumstances are shown to indicate his intention to adhere to the allegiance of his birth,—and so we find the fact to be that he did adhere to it. These views are not in conflict with *Lyndon v. Danville*, 28 Vt. 809 and *Albany v. Derby*, 30 Vt. 718. They are both pauper cases which involved the question of derivative settlements. In the former, Ralph Chamberlin, the father of the pauper was born in Danville in 1800. In 1824 he moved into Canada, where

the pauper, Israel, was born in 1826. The decision of the case was by a divided Court, all three of the judges filing opinions. Chief Judge Redfield asserted that the pauper was himself a citizen by the Act of Congress of 1802, having been born of parents who were citizens before the passage of that act. Judge Isham held that the Act of 1802 did not affect the citizenship of the pauper as it was retrospective in its effect and did not include children subsequently born, and that the Act of 1855 had no effect upon the case because it was passed after the death of both father and son. Judge Bennett was satisfied to consider the pauper the son of a *quasi* foreign parent. *Albany v. Derby*, on this point, simply follows the other case.

It is of interest to note that Judge Poland presided at the trials of both these cases in the court below, and that his reversal in the first, of which he must have known, did not create such an impression upon his mind as to deter him (three years later) from ruling the second in precisely the same way.

But we have no occasion to criticise these cases, for that which completely distinguishes them from the case in hand is the application of the aforesaid Act of 1855,—which, it was held, was passed too late to apply to those cases, but which certainly applies to this one.

But we are reminded that the act expressly provides that the rights of citizenship shall not descend to children whose fathers never resided in the United States, and it is urged that Horatio Nelson Jackson never resided here in the sense in which the term is used in the act. Our attention is called to our own decisions in pauper cases wherein we discuss the inability of a minor to acquire a residence or settlement. But those cases are not in point. There is nothing in the act indicating that any intent on the part of the person in question is required. The purpose of the provision is to prevent the

residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties,—which does not require the narrow construction asked for by the relator.

The citizenship acquired by Samuel Nelson Jackson at birth was a qualified one and of that peculiar character under the law which required an election on his part upon attaining his majority or within a reasonable time thereafter whether he would conserve the citizenship of the United States or that of Canada. This election when once made is binding upon him and the country of his choice. *Ludlam v. Ludlam*, 26 N. Y. at p. 371; Van Dyne on Cit. 38. Such an election Samuel Nelson seasonably made, for he came to this country a minor, completed his education here, resided here several years after attaining his majority, took the freeman's oath, engaged in business, paid taxes, and intended to become and thereby did become an American citizen in the full and unqualified sense of the term. Being desirous of engaging in the ministry, he applied in Massachusetts for certain Congregational funds to assist him in completing his training, but his application not being granted to the extent desired, he made a more advantageous arrangement for funds in Canada under an agreement that he would serve in the ministry there for a period of five years. His subsequent residence in Canada was as an American citizen. He did not, and would not had he been required, take the oath of allegiance there; he did not intend to do, and did not in fact do anything to divest himself of his full rights as a citizen of the United States.

His son, S. Hollister, the respondent, was born in Canada in 1875; born into that same kind of American citizenship which required an election on his part as it had of his father. He came to Vermont permanently to reside in 1895, a minor

and upon arriving at full age, made complete election of American citizenship by taking the oaths required by law, securing his enrollment as a voter in Barre, and by exercising and enjoying all the rights and performing all the duties of citizenship from that time until his election as state's attorney of Washington County,— an office which he was, by law duly qualified to accept and fill.

Petition dismissed with costs against the relator Phelps.

IN RE WILLIAM SAMMON.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed January 31, 1907.

Breach of the Peace—Alternative Sentence—Imprisonment in County Jail—Construction of Statutes—V. S. 5206; No. 200, Acts 1906.

Where the meaning of a statute is doubtful, the consequences may be considered in its construction.

The provision of §8, No. 200, Acts 1906, that imprisonment for a breach of the peace for a period not exceeding three months shall be in the county jail, refers only to a primary sentence of imprisonment, and does not apply to an alternative sentence of imprisonment for failure to pay a fine and costs imposed for that offence. Such alternative sentence must still be to the house of correction, in accordance with the requirements of V. S. 5206, which is not inconsistent with the provisions of said Act of 1906, which repeals only such Acts and parts of Acts as are inconsistent therewith.

HABEAS CORPUS, brought to the Supreme Court for the County of Rutland at its January Term, 1907, and then heard. On January 4, 1907, in the City Court of the city of Rutland, the relator was duly convicted of a breach of the peace, and sentenced to pay a fine of \$5.00 and costs, amounting in all to \$14.44, with the alternative sentence that if said fine and costs should not be paid within twenty-four hours, he be confined in the county jail in the city of Rutland in the county of Rutland, at hard labor, for the term of three times as many days as the whole number of dollars in said fine and costs, including the costs of commitment. The fine and costs not having been paid, the relator was committed to said county jail in accordance with his sentence; and thereupon brought this proceeding, alleging that he was being unlawfully imprisoned.

Hale K. Darling for the relator.

Clarke C. Fitts, Attorney General, and Benjamin Gates, State's Attorney, for the State.

WATSON, J. By V. S. 5206 in cases within its scope when the court sentences a respondent to pay a fine, or a fine and costs, and passes no other sentence, it shall further order that if the sentence is not complied with within twenty-four hours he shall be imprisoned in the house of correction for as many days as thrice the number of dollars to be paid by the sentence including the costs of commitment, etc. By Sec. 5218, persons thus imprisoned shall be kept at hard labor. By Sec. 5209 a person so committed may be discharged on paying the balance of the fine, or fine and costs, after deducting thirty-three and one-third cents for each day he has been committed for default of payment. These provisions apply to

cases for breach of the peace, unless the law in this respect has been changed by section 8, No. 200, Acts of 1906. That section provides that imprisonment for a breach of the peace for a period not exceeding three months shall be in the county jail, etc. By this act male persons thus imprisoned for such offence may be required to perform manual labor each day of the confinement except Sundays and legal holidays. But it contains no provision whereby the fine or fine and costs may be paid, as may be done under V. S. 5209.

By the Act of 1906, all acts or parts of acts inconsistent therewith were repealed. The question then is, whether the provisions of that act as respects imprisonment for breach of the peace are inconsistent with the law of V. S. 5206 requiring imprisonment in the house of correction for non-payment of fine, or fine and costs, imposed for that offence. No material inconsistency exists if the two can stand together. We think not only that they may stand together, but that to give them a different construction would work an injustice to those falling within the provisions of the Act of 1906, under an alternative sentence for the offence above named; for if such sentence may be to the county jail, then when once committed the prisoner may be put to manual labor for the whole term, the same as though his imprisonment was by direct sentence, and thus he be deprived of any opportunity subsequently to comply with his primary sentence by paying the fine, or fine and costs, even in money, to say nothing of receiving credit thereon for labor performed. When the meaning of a statute is doubtful, the consequences may be considered in its construction. *State v. Franklin County Sav. Bank & Trust Co.*, 74 Vt. 246, 52 Atl. 1069. Construing section 8, Act of 1906, as far as it relates to breaches of the peace, to have reference only to imprisonment

by direct sentence, that section is not in conflict with the law of V. S. 5206, and the latter was not, in the respects here involved, repealed by the former.

It follows that the relator is illegally imprisoned and he is discharged therefrom and remanded to the custody of the sheriff of Rutland County to be by him detained until re-sentenced.

STATE v. JAMES BANNISTER.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 5, 1907.

Criminal Law—Statutory Offences—Receiving Stolen Property—Sufficiency of Indictment—V. S. 4974.

Whether an indictment in the words of a statute creating the offence is sufficient, depends upon the statutory statement. If every fact necessary to constitute the offense is charged or necessarily implied by following the language of the statute, an indictment in the words of the statute is sufficient, otherwise not.

The word "feloniously" when used in an indictment both characterizes the crime and charges an unlawful intent.

Receiving stolen property, knowing it to be stolen, was an offence at common law; and V. S. 4974 merely provides for the punishment of that offence, without enumerating the acts that constitute it. An indictment for that offence must, therefore, use the terms which technically charge it at common law.

An indictment which charges that the respondent "did feloniously receive and have four head of cattle, of the value * * *, the goods and chattels of one George Marsh, then lately before felon-

iously stolen, taken and carried away by some evil disposed person," the respondent "then and there well knowing the said cattle to have been feloniously stolen, taken and carried away, contrary to the form of the statute," etc., is sufficient at common law, and would be sufficient for a statutory crime.

INDICTMENT for receiving stolen property, knowing it to be stolen. Heard on demurrer to the indictment at the September Term, 1906, Orleans County, *Haselton*, J., presiding. Demurrer overruled and indictment adjudged sufficient. The respondent excepted.

O. S. Annis, and *F. S. Rogers* for the respondent.

The indictment does not set forth such facts as constitute the crime, nor negative the presumption that the respondent received the property innocently. 1 Bish. Cr. Proc. §411; *State v. Day*, 3 Vt. 142.

The use of the word "feloniously" does not supply the requirement that the indictment should allege the intent with which the respondent received the goods. *State v. Keach*, 40 Vt. 113.

E. A. Cook, *State's Attorney*, for the State.

TYLER, J. This case is before us upon demurrer to the indictment which charges: "That James Banister * * *, did feloniously receive and have four head of cattle of the value of * * * *, the goods and chattels of one George Marsh, then lately before feloniously stolen, taken and carried away by some evil disposed person, * * *, he, the said James Banister, then and there well knowing the said cattle to have been feloniously stolen, taken and carried away, contrary to the form of the statute," etc.

The indictment is brought upon V. S. §4974 which provides that: "A person who buys, receives, or aids in the concealment of stolen property, knowing the same to be stolen, shall be punished the same as for the stealing of such property, * * *."

The ground of the demurrer is that the indictment alleges no act or intent of the respondent in violation of the statute referred to or of any other law.

It is true that guilty knowledge, involving guilty intent, on the part of the respondent, is essential to the constitution of this crime. 1 Whart. 983. Bishop says, 2 New Crim. Law 1138, that, as fundamental for the criminal intent, without which there can be no crime, and by the statutory terms, the receiver must know the goods to have been stolen, and that the intent must be in some way, fraudulent or corrupt.

There are crimes and misdemeanors that are created and defined by statutes. In such cases the indictment is sufficient if it follows the language thereof if every fact necessary to constitute the offence is charged or necessarily implied by following such language. But as was said by the Court in *State v. Fiske*, 66 Vt. 434, 29 Atl. 633, if, from the nature of the offence, the words of the statute do not clearly and definitely apprise the defendant of the offence charged, greater particularity must be used. Many cases that have arisen in this and other states illustrative of the exception to the general rule are in that case reviewed.

In the present case if the offence charged were statutory, an indictment following the language of the statute, without more, would be insufficient for the reason that no intent to commit a criminal act would be alleged, and the respondent might have received the cattle with the honest intention of

restoring them to the owner, or for other lawful purpose. *State v. Corcoran*, 73 Vt. 404, 50 Atl. 1110.

The respondent's counsel seem to have misunderstood the purpose of the statute which does not create nor define the offence. Receiving stolen property by a person, knowing it to be stolen, was a misdemeanor at common law, but by 3 W. and M. c. 9, it was made a felony. Our statute was enacted to punish the common law offence by its legal or common law designation without enumerating the acts that constitute it. It was therefore necessary to use in the indictment the terms which technically charge the offence at common law. Rob. Dig. p. 217, pl. 208.

Referring then to the common law we find that the obviously essential elements of the crime are as above stated—knowledge that the goods were stolen and receiving them with an unlawful intent. Wharton says, Vol. 1, 991, that it is enough if the respondent receives and holds the property for the purpose of obtaining an offered reward from the owner. *State v. Pardee*, 37 Ohio St. 63.

By the use of the word "feloniously" in the indictment the prosecutor charged the respondent with the commission of a grave crime. Bishop says, 1 New Crim. Law, 427: " 'Felonious,—' standing alone, rather designates the grade of the crime—that is 'felony' in distinction from misdemeanor—than any particular form of the felonious intent. Yet, in a sort of general sense, it points to the intent which enters into a felony."

The form of indictment here used is in accordance with that prescribed in Bish. New Crim. Pro. and in Arch. Crim. Pro. It is the form generally used in other states under similar statutes. In *People v. Johnson*, 1 Parker's Crim. R. 564, the Court said it had found no case where the indictment had

omitted to charge the respondent with having feloniously received the stolen property with a knowledge of its having been stolen.

The indictment is sufficient at common law and would be sufficient for a statutory crime.

Judgment affirmed and cause remanded.

JOHN COOLIDGE v. WARREN R. TAYLOR.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 5, 1907.

*Assumpsit for Taxes—Conclusiveness of Court's Findings—
New Trial—Surprise.*

If a finding of facts can be supported upon any rational view of the evidence, it should stand.

Where defendant was sued for taxes assessed on the theory that he was a resident of Plymouth, but his evidence tended to show that he then resided in Woodstock, and the case was tried upon the issue whether he had moved to Woodstock, and the court did not decide that he was not a resident of Woodstock, nor that he was a resident of Sherburne, but found that he apparently resided there, which defendant denied, a new trial will be granted plaintiff on the ground of surprise, it appearing that, had the court not found an apparent residence in Sherburne, it would probably have found that defendant did not live in Woodstock, as he claimed, and there being no evidence of residence in any other town, evidence offered by plaintiff tending to show residence in Plymouth might have produced a decision in his favor.

ASSUMPSIT for the collection of taxes, begun by trustee process, under V. S. 506. Plea, the general issue. Trial by court at the June Term, 1905, Windsor County *Haselton*, J., presiding. Judgment for the defendant. The plaintiff excepted.

The court found as follows:

"The question is as to the tax of 1898. In making up the grand list of Plymouth on the first of April, 1898, the listers treated defendant as a resident of said town; as he had not given an inventory they put property into his list which they valued at \$1,400.00, doubled the same and to the sum obtained by doubling, added the further sum of \$10,000, claiming to act by virtue of section 424, V. S.

The question at the threshold of the case is—has the plaintiff by a fair balance of evidence established the residence of Warren R. Taylor in Plymouth on the 1st of April, 1898? The testimony of the town officials, taking direct and cross-examination together, seems to be largely matter of supposition, based upon their claim and understanding that he had always lived in that town; there was a place there that had always apparently been called the 'Taylor homestead,' but it does not appear that the title to that was in Warren R. Taylor. They testify in much the same way that they had seen him there from time to time with more or less frequency; just how close to the first of April no one says with definiteness. One of the selectmen of 1897-8, Mr. Pinney, was asked how long Mr. Taylor had lived at the Taylor homestead so-called, and replied: 'He always lived there, practically; I don't know but he lived a few years ago at Plymouth Union; that is in

the town of Plymouth.' In cross-examination he is asked: 'Did you not know that he was a tax-payer and resident of the town of Sherburne several years, and an office holder there?' and says that he did.

Now Taylor could not have been a tax-payer and resident of the town of Sherburne for several years and still be during those same years a resident of Plymouth.

On the other hand is testimony tending to show that Taylor was not a resident of Plymouth the 1st of April, 1898. Miss Stella Taylor, daughter of defendant, a woman of about 30, who had lived in Plymouth at the Taylor homestead, so that she was a person who ought to know, testified that her father had not lived there for a number of years before April, 1898. Her testimony and that of her brother, tends to show that Taylor was there occasionally, at the Taylor homestead, so-called, and he might have been seen there occasionally, but nobody testifies to having seen him there in control of things. He might well have been there visiting, having a son and daughter there, and living as he did in a neighboring town.

Whatever his motive for changing his residence from Plymouth to elsewhere, we think that before April, 1898, and probably for a considerable time before, he had ceased to reside in Plymouth. We are not called upon to decide whether he was a resident of Woodstock—apparently he was not. The testimony is not entirely clear about it, but apparently his residence was in Sherburne. It is enough for us to pass upon the question of whether his residence was in Plymouth. We find that he was not a resident of Plymouth on the 1st of April, 1898, and was not taxable in the town of Plymouth, on any personal property; that being so, as we understand it the listers were without jurisdiction to proceed as they did. With

this finding that the defendant was not a resident of the town of Plymouth, April, 1898, and not taxable in said town, judgment must be entered for defendant."

The plaintiff also brought a petition for a new trial, on the ground of surprise, to the Supreme Court for Windsor County at its January Term, 1907, which was then heard with the exceptions.

William W. Stickney, John G. Sargent, and Homer L. Skeels for the plaintiff.

The fact of residence and the intent to make the place of residence the home must concur to constitute a domicile. Phil. Dom. 11; Story Conf. Laws, §44; *Fulham v. Howe*, 62 Vt. 394.

The presumption of law is against a change of domicile. Jacobs Dom. §§114, 115; *Somerville v. Somerville*, 5 Ves. Jr. 750; *Bell v. Kennedy*, L. R. 1 Sch. App. 307; *Isham v. Gibson*, 1 Bradf. 89; *Jopp v. Wood*, 4 DeG. J. & S. 616; *Fulham v. Howe*, 62 Vt. 386; *Littlefield v. Brooks*, 50 Me. 475; *Gilman v. Gilman*, 52 Me. 165; *Hallet v. Bassett*, 100 Mass. 167; *Dupruy v. Wurtz*, 53 N. Y. 556.

Davis & Davis for the defendant.

When the right to tax a person in a particular town is a question, the burden is upon the town, claiming the right to prove that such person was legally set in the list and taxable in such town. *Hurlburt v. Green*, 41 Vt. 490; *Gregory v. Bugbee*, 42 Vt. 480; *Blood v. Sayre*, 17 Vt. 609; *Lyman v. Fiske*, 17 Pick. 231.

TYLER, J. The action is assumpsit, with trustee process for the collection of taxes; trial by the court; judgment for the defendant. The plaintiff excepted to the rendering of the judgment upon the facts found by the court, also to the findings of facts as being against the evidence. The findings and a transcript of the stenographic record of the trial are made part of the exceptions.

1. The first exception cannot be sustained for the court found and reported facts sufficient to support its judgment.

2. The plaintiff did not except upon the ground that there was no evidence to support the judgment, but upon the ground that it was "against the evidence," which was the equivalent of claiming that it was against the weight of evidence. This was not sufficient for there was evidence tending to support the defence, and the weight of the evidence was for the consideration of the court. The often stated rule is if the finding of facts can be supported upon any rational view of the evidence it should stand. *Weeks v. Barron*, 38 Vt. 420; *State v. Peach*, 70 Vt. 283, 40 Atl. 732.

Judgment that there was no error in the trial; judgment reversed pro forma; petition sustained with costs; findings set aside; new trial granted; cause remanded.

PETITION FOR NEW TRIAL.

It must be conceded that the direct issue for the county court to try was whether or not the defendant resided in Plymouth and was legally taxable in that town on April 1, 1898. The plaintiff's evidence tended to show that at that time and for many years prior thereto that town was his place of residence. The defendant's evidence tended to show that on March 3, 1898, his wife went to Woodstock to take care of a Mrs. Wilder and remained with her until her death April 30

of that year, and then went to live with a Mrs. Hewitt in that town where she remained several months; that on March 30, 1898, the defendant carried a straw-bed, a table, a few old chairs and some boxes to Mrs. Wilder's and stored them in her chamber; that the defendant went to Mrs. Wilder's to visit his wife "a good many times" in April, frequently staying over night, but never occupying the room where his goods were stored nor using the goods while stored there. In support of the claim that the defendant changed his residence to Woodstock before April 1, and to show a continued residence in the latter town he introduced evidence to show that in November of that year he hired a room there of Mrs. Washburn, set up a stove in it and got some wood, though he never built a fire in the stove, and Mrs. Washburn did not know where he lived while his wife was at Mrs. Hewitt's.

The tendency of the testimony of the defendant's son and daughter was to show that their father and mother lived in Sherburne down to 1898, that their mother went to Woodstock early in March and that their father went there before April 1st. The daughter testified that she visited her mother at Mrs. Wilder's in April and saw this furniture there. This evidence was evidently introduced as tending to show that the defendant and his wife had taken up their residence in Woodstock before April 1, and that prior to that date they had lived in Sherburne. The testimony of these two witnesses was that their mother owned the Plymouth homestead, that the daughter owned the stock and household furniture and did the housework, and that the son carried on the farm and furnished the table.

The defendant stated to the listers that he had moved to Woodstock and should not be assessed for a poll in Plymouth.

His counsel say in their brief in the petition for a new trial that, "The claim that the residence of Warren R. Taylor was in Sherburne was not based on any testimony or assertions of counsel." Again they say that, "Warren R. Taylor's counsel was not claiming a residence in Sherburne, but in Woodstock." Again, "From 18— to 1896, inclusive, Warren R. Taylor had been a resident and taxpayer of Sherburne. It does not appear where his residence was in 1897 * * *."

We have referred to the transcript of testimony and to the present attitude of counsel to show that no claim was made that the defendant resided in Sherburne in April, 1898; on the contrary, the whole tendency of the defendant's evidence was to show that though he *had* lived in Sherburne several years, prior to April 1, he had moved to Woodstock. This was the only issue tried—whether the defendant had in fact, as he claimed, moved to Woodstock prior to April, 1898.

The following is the concluding paragraph in the finding of facts by the court below:

"Whatever his motive for changing his residence from Plymouth to elsewhere, we think that before April, 1898, and probably for a considerable time before, he had ceased to reside in Plymouth. We are not called upon to decide whether he was a resident of Woodstock—apparently he was not. The testimony is not entirely clear about it, but apparently his residence was in Sherburne. It is enough for us to pass upon the question whether his residence was in Plymouth. We find that he was not a resident of Plymouth on the 1st of April, 1898, and was not taxable in the town of Plymouth on any personal property; that being so, as we understand it, the listers were without jurisdiction to proceed as they did."

We are of the opinion that the court could not have decided as an isolated fact that the defendant was not a resident

of Plymouth at the date in question. No claim was made that he did not reside either in Plymouth or Woodstock. While the question was, as the court said, whether the plaintiff had established the defendant's residence in Plymouth or not, the case was tried, as the evidence shows, upon the issue whether or not he had moved to Woodstock. The court did not decide that he was *not* a resident of Woodstock, nor that he *was* a resident of Sherburne, but said that "apparently his residence was in Sherburne." We think it could not have arrived at the decision that his residence was not in Plymouth without being influenced by what it termed was a probability that his residence was in Sherburne. In other words, if the court had known, what now seems to be a conceded fact, that the defendant had no residence in Sherburne, either in 1898 or 1897, its decision would most likely have been different.

The plaintiff was surprised by the judgment rendered and by what we think must have influenced that judgment. The plaintiff had no occasion to introduce evidence that the defendant had not a residence in Sherburne, for it was not claimed. If, during the trial, the defendant had claimed his residence in Sherburne and the plaintiff was not prepared to meet that issue, he should have moved for a continuance, but the plaintiff was not surprised until the judgment was rendered. *Briggs v. Gleason*, 27 Vt. 114; *State v. White*, 70 Vt. 225, 39 Atl. 1085.

If there had been no evidence in the case about the defendant's residence in Sherburne, we think, upon a careful reading of the record, that the court would have found that the defendant did not acquire a residence in Woodstock, as he claimed before the listers. Then, there being no evidence of a residence in any other town, the testimony of the witnesses

produced by the plaintiff that the defendant was often seen at the Plymouth homestead and was apparently living there as other men live upon their farms, would very likely have produced a different decision by the court.

It was held in *Shellhouse v. Ball*, 29 Cal. 607, that the surprise must be conclusively shown, and, besides, it must appear that the fact or facts from which the surprise resulted had a material bearing upon the case, and that the verdict may be mainly attributed to their effect. This case falls clearly within these rules. Surprise is clearly established and it was without the plaintiff's fault. The case does not fall within the rule stated in *Wilson v. Blake*, 53 Vt. 305, for here, in the circumstances, the plaintiff had no other remedy than by a petition for a new trial.

Upon another trial the new evidence proposed would be likely to produce a different result.

New trial granted.

FRED D. TAYLOR v. JOSEPH ST. CLAIR.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 16, 1907.

Assumpsit—Improper Argument—Withdrawal and Instruction to Disregard—Effect—Charge—New Trial—Surprise—Newly Discovered Evidence.

In assumpsit for cash paid for dinners that defendant did not dispute his obligation to furnish, but defended only on the ground that plaintiff had procured his dinners at places other than the

restaurant where defendant had arranged to furnish them, and the evidence tended to show that said arrangement was intended for plaintiff's convenience, and not as a limitation upon his right to procure his dinners elsewhere, it was not error for the court to omit to instruct the jury that plaintiff had no right to get his dinners without authority from defendant.

A certain statement made in argument under exception having been immediately withdrawn, and the jury thereupon instructed to disregard it, the error, if any, was thereby cured.

A new trial should not be granted on the ground of surprise, except in a strong case, where the petitioner neglected seasonably to move for a continuance.

The newly discovered evidence revealed by the affidavits attached to a petition for a new trial examined and held not likely to produce a different result on another trial.

GENERAL ASSUMPSIT. Pleas, the general issue and declaration in offset. Trial by jury at the June Term, 1905, Windsor County, *Haselton*, J., presiding. Verdict and judgment for the plaintiff. The defendant excepted. The only exception taken to the argument of plaintiff's counsel, and what transpired in connection therewith is shown by the following from the bill of exceptions.

"There was evidence tending to show that the plaintiff kept a diary during some of the time that he worked for the defendant. In his closing argument Mr. Enright said:— 'When I was a boy and worked on a farm I never kept a diary.'

Mr. Davis: We desire an exception to that.

Mr. Enright: I will withdraw it.

The Court: The jury will disregard anything said about that."

The defendant, under V. S. 1662, also brought a petition for a new trial on the ground of surprise and newly discovered evidence, to the Supreme Court for Windsor County

at its January term, 1907. This petition was heard with the defendant's exceptions.

Davis & Davis for the defendant.

Improper argument of counsel is ground of reversal. *Daggett v. Champlain Mfg. Co.*, 71 Vt. 372; *Ronchou v. Rutland Railroad Co.*, 71 Vt. 148; *Cutler & Martin v. Skeels*, 69 Vt. 154; *Lamoille Co. Nat. Bank v. Hunt*, 71 Vt. 251; *Rea v. Harrington*, 58 Vt. 181; *Magoon v. B. & M. R. R. Co.*, 67 Vt. 199; *State v. Hannett*, 54 Vt. 83; *State v. Fitzgerald*, 68 Vt. 125.

J. C. Enright, and *E. R. Buck* for the plaintiff.

There was a conflict of evidence as to what the arrangement in regard to the lunches in fact was. The jury must have found that the plaintiff had authority to buy his lunch and charge it to defendant. All that defendant was entitled to was a charge correctly and fully stating the law applicable to the facts of the case as they appeared in evidence. *State v. McDonnell*, 32 Vt. 491; *Whitcomb v. Fairlee*, 43 Vt. 675; *Clark v. Boardman*, 42 Vt. 667; *Wetherby v. Foster*, 5 Vt. 136.

It is well settled that no exception lies where the improper remarks of counsel are withdrawn and the jury instructed to disregard them. *Lockwood v. Fletcher*, 74 Vt. 72; *Machine Co. v. Holden*, 73 Vt. 396.

If surprised by plaintiff's evidence, defendant should have asked for a continuance, and having neglected to do so, must abide the result. *Reynolds v. Harram*, 56 Vt. 449; *Westmore v. Sheffield*, 56 Vt. 239; *Noyes v. Spaulding*, 27 Vt. 420; *Briggs v. Gleason*, 27 Vt. 116; *Badger v. State*, 69 Vt. 217;

State v. Manning, 75 Vt. 190; *Dunn v. Halbut*, 52 Vt. 353; *Thayer v. Central Vt. R. R. Co.*, 60 Vt. 214; *Jones v. Sennott*, 57 Vt. 355; *Dodge v. Kendall*, 4 Vt. 31; *Burr v. Palmer*, 23 Vt. 244; *Haskins v. Smith*, 17 Vt. 263.

MUNSON, J. The plaintiff's work included daily trips from Weathersfield to Windsor, and required him to be in Windsor at the noon hour. He claimed to recover an item of cash paid for lunches at three different places. Defendant excepted to the court's omission to charge that the plaintiff had no right to get lunches without authority from him. The evidence is referred to upon this question. Defendant testified that he told a restaurant keeper to let his men have their dinners and he would pay for them and that he informed his men of this, and never told them to go anywhere else. This could prevent a recovery only on the ground that the plaintiff was restricted to purchases at a particular place and on defendant's account; for it is clear that the defendant did not deny his obligation to furnish the plaintiff's dinners. But defendant testified further that the other driver got his dinners where he pleased, and that he had paid him the amount expended. This indicated that the arrangement made for the men was intended as a provision for their convenience, and not as a limitation upon their right. There was nothing tending to show that plaintiff's purchases were unreasonable, and if there was no restriction as to the place or manner of purchase, the defendant's liability was unquestioned. The instruction claimed was not adapted to the case presented by the evidence, and the failure to give it was not error.

If the matter stated in argument under exception was improper, the error was cured at the time.

Judgment affirmed.

Defendant seeks a new trial on the ground of surprise and newly discovered evidence. The specification was for work done in 1902-3. Plaintiff claimed that he also worked for defendant in the fall of 1901, that certain debits in defendant's book properly referred to that time, and that the date had been changed to make them apply to the fall of 1902. This claim was disclosed by inquiries made of the defendant when called to the stand by the plaintiff at the opening of the trial. It was fully presented in the testimony of the plaintiff, who was the next witness. Defendant proceeded with the trial without moving for a continuance. A strong case must be shown to secure a new trial in these circumstances. *Briggs v. Gleason*, 27 Vt. 114.

It was the duty of the defendant to be diligent in the use of such opportunities as the progress of the trial afforded. The usual recess from Saturday noon to Monday noon occurred before the defence was closed. It is apparent from the evidence previously taken that defendant then had in mind, as facts material upon the question of time, the building of a barn on his brother's farm in 1901, and the frequent exchanges of work between the two farms that season. This must have directed his attention to his brother and his brother's wife, and to the carpenter who built the barn, as persons who would be likely to know whether the plaintiff worked for him during that fall. His duty in the opportunity presented, as regards these affiants, is to be measured by the fact that a search for the required evidence would not be one of random inquiry. *Jones v. Sennott*, 57 Vt. 355. The distance from the county seat to the section where the defendant and these witnesses lived was by no means an insuperable obstacle to procuring additional testimony. The usual practice of liti-

gants would take the defendant home Saturday afternoon. It does not appear that any effort at further preparation was made. We proceed, however, to an examination of the newly discovered evidence without excluding any of the affidavits from consideration.

The inquiry whether plaintiff worked for defendant in the fall of 1901 involved the further question whether plaintiff's work in 1902 ended with September as plaintiff claimed, or included October as defendant claimed. Four witnesses called by the defendant, who lived in his family or were frequently at his place, testified on the trial that plaintiff was not working there in the fall of 1901, and two of these testified that he was working there in October, 1902. The affidavits presented in support of the petition are those of Louis St. Clair, Annie St. Clair and Allen, the three already referred to, and those of Blanchard and Lambert. The evidence of Louis St. Clair, Allen and Blanchard is purely cumulative. Moreover, Blanchard's statement that he went to St. Clair's in the summer of 1902 and thinks he saw plaintiff there, and that later in the year the milk route was started and that plaintiff drove the team, he should say about two months,—is too indefinite to be accepted as a substantial contradiction of plaintiff's testimony that he commenced working that year on the last day of August and worked through September. The diary of Annie St. Clair, which shows what men came from defendant's farm to her husband's farm in 1901 to work in exchange, and contains no entry showing that the plaintiff came, if given entire credit, is far from conclusive. The most important affidavit is that of Lambert, who says that he sold his milk route to defendant in August, 1902, and that plaintiff was driving the milk wagon and taking his milk in Sep-

tember and October; and that he knows plaintiff was taking milk as late as the 19th or 20th of October, because on that day he gave another party credit for milk sent by him. No mention is made of any diary, memorandum or statement. If there was one, it evidently had not been recently examined, for that would doubtless have enabled the witness to give the exact date. This leaves it quite possible that affiant has mistakenly assigned to October what occurred in September.

We do not consider it essential to present a summary of the evidence on which the verdict was based. Upon a review of the newly discovered evidence in connection with that given at the trial, it does not seem to us probable that the additional testimony would change the result. This being the case, a new trial cannot be granted. *Westmore v. Sheffield*, 56 Vt. 239; *Badger v. State*, 69 Vt. 217, 37 Atl. 286; *State v. Manning*, 75 Vt. 190, 54 Atl. 181.

Petition dismissed with costs.

EAST MONTPELIER v. CITY OF BARRE.

January Term, 1907.

Present: TYLER, MUNSON, WATSON, JJ., and WATERMAN, Superior J.

Opinion filed February 16, 1907.

*Towns—Paupers—Legal Residence—Division of Towns—
Boundary Line—Dwelling Divided—Effect on Residence
—No. 165, Acts 1894.*

Where legislation abolishes a township and divides it into two new municipalities, the statutory liability of the original town to sup-

port its residents, should they become paupers, goes with the land on which they respectively reside when such legislation takes effect, and passes to that municipality which thereby acquires jurisdiction thereof,—in the absence of a different statutory requirement.

Where legislation annexes the territory of one town to that of another, no inhabitant's residence is thereby changed, unless he is actually or in legal contemplation residing on the annexed territory at the time such legislation takes effect.

Where the division line between a town and a city passed diagonally through a person's residence, leaving six-sevenths thereof in the town, that person was a resident of the town, and not of the city.

Where at the time a pauper moved into the plaintiff town he was a resident of another town which was then liable for his support should he become a pauper, the fact that after his removal the boundary of the latter town was so changed as to include the pauper's house in an adjoining city did not transfer his legal residence to that city.

No. 165, Acts 1894, abolishing the township of Barre and dividing it into the city of Barre and the new town of Barre, and providing for the enforcement against the city of Barre of all claims and causes of action against the old town of Barre, and for their subsequent apportionment and adjustment between said two new municipalities, did not create a liability for the support of a pauper, who, when said Act took effect, was residing in a dwelling thereby included in the new township of Barre, and where he had continuously resided for more than three years supporting himself and family, but whence he thereafter moved to the plaintiff town, where he was living when No. 144, Acts of 1896, which allotted said dwelling to the jurisdiction of the city of Barre, took effect.

Assumpsit for the expenses incurred in the support of a pauper. Heard on the report of a referee at the March Term, 1906, Washington County, *Rowell, J.*, presiding. Judgment for the defendant to recover its costs. The plaintiff excepted. The opinion states the case.

Senter & Senter for the plaintiff.

John W. Gordon for the defendant.

The pauper must actually reside on the annexed territory at the time the Act annexing it takes effect, in order to transfer the liability of his support with such territory. *New Portland v. Rumford*, 13 Me. 299; *Great Barrington v. Lancaster*, 14 Mass., 253; *Fitchburg v. Westminster*, 1 Pick. 144; *Hollowell v. Bowdoinham*, 1 Greenl. 129; *West Springfield v. Granville*, 4 Mass. 486.

MUNSON, J., No. 165 Acts of 1894, abolished the town of Barre, and formed from its territory the city of Barre and the new town of Barre, dividing them by a line which passed through North's house in the manner hereafter stated. This act took effect on the first Tuesday of March, 1895. North was living in this house on that day, and had lived there since 1890, supporting himself and his family. So North had acquired a legal residence in the old town of Barre, and when that town was divided he became a legal resident of the new town of Barre, or of the city of Barre, according as the location of his dwelling was determined by the dividing line. *Westfield v. Coventry*, 71 Vt. 175, 44 Atl. 66; *Wilmington v. Somerset*, 35 Vt. 232; *Mason v. Alexandria*, 3 N. H. 303.

The line passed diagonally through the house, leaving about six-sevenths of it in Barre town. The rear entrance was in Barre town, and the front entrance in Barre City. On the ground floor there was a kitchen, which was the general living room, a bedroom, a pantry, and a woodshed. The woodshed and pantry were wholly in Barre town, and all of the bedroom except a small triangular section. The line ran diagonally through the kitchen, leaving a corner of the stove-

in Barre city. This is all we have regarding the construction and occupancy of the building.

This location of the house could not give the occupant a residence in both towns, and is not to be so treated as to leave him without a residence in either. As a place of residence, the building cannot be divided between the two towns, and must be held to be in one or the other. A man's dwelling-house is the building in which he lives, and in a case like this the legal status of the building as a dwelling place must be determined by the location of that part of the structure most closely connected with the primary purposes of a dwelling. Upon this view, the facts reported place North's house in the new town of Barre. So the act of 1894 gave North a legal residence in that town.

By No. 144, Acts of 1896, which took effect November 24 of that year, and was in form an amendment of the act of 1894, the dividing line was so changed as to include in the city of Barre all of the North place that was allotted to the town of Barre by the original division. But North had moved to East Montpelier the spring before, and was living there at this time. So the act of 1896 did not operate as a transfer of North's legal residence from the town to the city of Barre. An annexation of territory will not effect a change of residence unless the person is then dwelling upon the land, actually or in legal contemplation. *Westfield v. Coventry*, 71 Vt. 175, 44 Atl. 66.

This matter is not controlled by the section of the act of 1894 which provides for an enforcement against the city of Barre of all claims and causes of action then existing against the town of Barre and their subsequent apportionment and adjustment between the city and the new town. There was

no claim or cause of action until the aid was required and furnished. Until then, there was only a general governmental obligation upon which a cause of action might subsequently arise. A liability of this nature is not within the provision.

Judgment affirmed.

HATTIE WILLARD v. E. F. NORCROSS.

January Term, 1907.

Present: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Opinion filed February 16, 1907.

Physicians and Surgeons — Malpractice — Evidence — Wilful Injury—Subsequent Manifestations of Ill Will.

Evidence of a subsequent manifestation of ill will is inadmissible, unless it tends to prove the existence of ill will at the time in question; and it does not so tend unless there is some connection between the subsequent occurrence and the prior transaction which it is claimed to characterize.

In an action against a physician for malpractice in the treatment of plaintiff's wrists, evidence of defendant's acts of incivility toward plaintiff, more than five months after the treatment had ceased, is inadmissible to prove defendant's ill will at the time of the treatment.

In an action against a physician for malpractice in the treatment of plaintiff's wrists, evidence of defendant's manifestations of ill will toward plaintiff, beginning five months after the treatment had ceased, is inadmissible to prove that the alleged malpractice was intentional. *Gifford v. Hassam*, 50 Vt. 507 and *Knapp v. Fuller*, 55 Vt. 311, distinguished and explained.

Case for malpractice. Plea, the general issue. Trial by jury at the October Term, 1905, Essex County, *Powers, J.*, presiding. Verdict and judgment for the plaintiff. The defendant excepted.

The plaintiff testified that she did not claim that the defendant failed to treat her wrists properly because of any ill feeling or malice toward her, but that his negligence was because "he didn't know any better." The plaintiff did not claim any exemplary damages, and requested the court not to submit that question to the jury.

The defendant, under V. S. 1662, also brought a petition for a new trial on the ground of newly discovered evidence, to the Supreme Court for the county of Essex at its October Term, 1906. This petition was heard with the defendant's exceptions.

J. W. Redmond for the defendant.

Herbert W. Blake for the plaintiff.

MUNSON, J. The suit is for malpractice in the treatment of plaintiff's wrists. The declaration contains a count charging intentional injury. To prove defendant's animus, the court received evidence that he treated the plaintiff discourteously after his attendance had ceased. As the case stood, this was error.

The defendant's connection with the case ended in January, and the incidents testified to occurred later than May. The plaintiff's statements, as detailed in the exceptions, are substantially these. She met the defendant once on the overpass, and he turned around and faced her, and acted as though he was going to block her way, and she walked right towards him, and he turned around and went off; nothing being said

by either. Another time, she met him on the sidewalk in front of the post-office, where she considered there was room enough for him to pass, and he ran against her, hitting her shoulder and turning her around, and said nothing by way of excuse or otherwise. On another occasion, he stood on the threshold of the post-office, and wouldn't move for her, and she had to squeeze by him. There is nothing else in the case tending to show ill will.

It is true that evidence having a legitimate tendency to show the defendant's animus in the matter complained of may be found in things subsequently said and done. Thus, in suits for malicious prosecution, the plaintiff may show measures taken to give publicity to the commencement of the prosecution, or acts of hostility committed during its pendency. *Chambers v. Robinson*, 1 Stra. 691; *Cooney v. Chase*, 81 Mich. 203; *Gifford v. Hassam*, 50 Vt. 704. So in suits for slander, the plaintiff may show subsequent repetitions of the words declared upon, or the speaking of words of like import, or of words having reference to the subject-matter of the words charged. *Cavanaugh v. Austin*, 42 Vt. 576; *Rea v. Harrington*, 58 Vt. 181, 2 Atl. 475; *Smith v. Moore*, 74 Vt. 81, 52 Atl. 320; *Brown v. Barnes*, 39 Mich. 211; *Garrett v. Dickerson*, 19 Md. 418; *Kennedy v. Gifford*, 19 Wend. 296; *Chamberlin v. Vance*, 51 Cal. 75. So also in actions for libel, the plaintiff may show a subsequent publication referring to the one in suit, or connecting the plaintiff with it, or repeating the same charge. *Knapp v. Fuller*, 55 Vt. 311; *Austin v. Remington*, 46 Conn. 116; *Delegall v. Highley*, 8. C. & P. 444. Some courts go further, and receive evidence of subsequent distinct and independent defamations. Other courts hold such evidence inadmissible. *Mix v. Woodward*, 12 Conn.

262; *Watson v. Moore*, 2 Cush. 133; *Parmer v. Anderson*, 33 Ala. 78; See *Conant v. Leslie*, 85 Me. 257.

All the decisions of this Court relied upon by the plaintiff which seem to require consideration are included in the above citations. A further reference to two of them is desirable. It was held in *Knapp v. Fuller*, that a certain conversation had with the defendant, in which he manifested a hostile feeling towards the plaintiff, was admissible. In that case the defamatory words themselves afforded evidence of malice, and the conversation shown occurred only a few days after their publication and evidently before a second publication in which the plaintiff was connected with the first by name. A conversation corroborative of the malicious import of the publication declared upon, and coming between that and a subsequent affirmance of it, might well be held admissible. It was said in the opinion in *Gifford v. Hassam*, that evidence of the defendant's ill will just before and just after the prosecution was commenced was admissible to show his feeling at the time it was commenced. The acts shown were successive attachments of the plaintiff's property, made and procured to be made by the defendant while the prosecution was pending. Here the pendency of the prosecution afforded a connection between the subsequent acts and the wrong complained of. The defendant's attempts to burden the plaintiff further during the pendency of a prosecution he had procured, manifestly tended to charge him with malice in procuring it. We find nothing in these cases that sustains the admissibility of the evidence in question.

It is said that exhibitions of ill will occurring before and after the act are equally admissible. But the considerations bearing upon their admissibility are not necessarily the

same; and in considering the subject for our present purpose we have referred only to cases of the latter class. It is true that the evidentiary effect of both prior and subsequent animosity depends upon a supposition of its duration. But the question in one case is whether the animosity continued to the time of the transaction; in the other, whether it existed as early as the transaction. The inquiry regarding subsequent animosity involves the question of its origin. Hostility manifested after the act complained of may have resulted from any difficulty preceding the manifestation; and it can be evidence of malice in the act complained of only upon the theory that it originated before the act. Viewed solely in their relation to time, things prior and things subsequent appear as causes and effects. Prior malice may be the cause of a wrongful act in the matter complained of, and subsequent malice may be the result of something else that occurred in or flowed from it. Ill will may be developed in one by an affair in which he acted without malice.

Evidence of a subsequent manifestation of ill will is not admissible unless it tends to prove the existence of ill will at the time in question. It is clear that there must be some connection between the subsequent occurrence and the prior transaction which it is claimed to characterize. But a sufficient connection may be found in a variety of circumstances. Subsequent expressions of ill will may often be received in support of some evidence of malice afforded by the transaction itself. Manifestations of ill will occurring after the transaction may be shown in connection with manifestations occurring before, as tending to show a continued ill will covering the time of the transaction. Subsequent verbal expressions of ill will may themselves serve to connect the ill will with the matter complained of,

as in cases of slander and libel. The nature of an unspoken manifestation may be such as to connect the ill will with the affair in question; as where one of two women occupying apartments in the same house inflicted upon the other what she claimed was an accidental injury, and did not go to see or inquire about the injured person, although she was for some time confined to her bed and attended by a physician. *State v. Alford*, 31 Conn. 40. The inferences arising from proximity of time and the nature of the manifestation may afford a sufficient connection; as where one who had injured his opponent in a fight by throwing a dangerous missile, sought him half an hour later, pistol in hand, threatening his life. *McManus v. The State*, 36 Ala. 285. Repeated acts of the same general character as a prior act, manifesting a settled and persistent purpose to injure, may be shown to prove malice in the prior act; as where the publisher of a newspaper followed the article declared upon at frequent intervals with other articles, containing attacks regarding different matters, and together manifesting a purpose to bring the plaintiff into contempt. *Commonwealth v. Damon*, 136 Mass. 441.

We find nothing in the cases to indicate that subsequent unconnected expressions of dislike are admissible as proof that an act in itself lawful was improperly done because of malice. We have here nothing more than an opportunity to do a malicious injury in January, and manifestations of ill will commencing five months later. There is nothing in this that tends to show that such improper surgical treatment as there may have been was intentional.

The claim of malicious injury was finally waived, but the evidence was prejudicial upon the issues submitted.

Judgment reversed and cause remanded.

The petition for a new trial is not sustained, and is *dismissed with costs.*

MARTIN C. ROWELL v. B. FRANK RICKER.

January Term, 1907.

Present: TYLER, MUNSON, WATSON, JJ., and HALL, Superior J.

Opinion filed April 5, 1907.

*Deceit—Procurement of Property by False Representations—
Effect of Discharge in Bankruptcy.*

A declaration which alleges that defendant sought to buy of plaintiff certain sheep of the value of \$1,200; that plaintiff refused to give defendant credit, but insisted upon a cash transaction; that there-upon defendant falsely, fraudulently, and deceitfully represented to plaintiff that a \$1,500 check of a certain company, whose check plaintiff knew to be worth that sum of money, had been mailed to defendant to pay for said sheep, would be received by defendant that day, and immediately delivered to plaintiff; that plaintiff, relying on said representations and believing them to be true, then and there delivered the sheep to defendant, who then and there converted them to his own use; that said check had not been mailed, as defendant, who made said representations with the deceitful and fraudulent purpose of getting possession of said sheep and converting them to his own use, well knew; and that defendant has never paid for said sheep, sufficiently alleges a liability created by means of a fraud involving moral turpitude and intentional wrong, and which, therefore, is not affected by defendant's discharge in bankruptcy.

CASE for deceit. Pleas, the general issue, and a special plea of defendant's discharge in bankruptcy. Heard on plaintiff's demurrer to said special plea at the December Term, 1906, Orange County, *Waterman*, J. presiding. Demurrer sustained, and plea adjudged insufficient. The defendant excepted. Cause passed to the Supreme Court before trial on the merits. The opinion fully states the case.

Harvey, Harvey & Harvey for the defendant.

A false statement as to what one will do in the future does not warrant a rescission for fraud. *Benjamin, Sales*, 470; *Cohn v. Broadhead*, 51 Neb. 834; *Perkins v. Lougee*, 6 Neb. 220; *Dawe v. Morris*, 149 Mass. 834; *Best v. Smith*, 54 Vt. 617; *Dyer v. Tilton*, 23 Vt. 313.

The representation that a check was coming would have been no inducement to plaintiff to part with the sheep, unless defendant also promised to pay for the sheep from the proceeds of the check; but the breach of such a promise could afford no ground for a rescission, unless the promise was made with the intent not to fulfill it. *Wallace v. Lehinan*, 85 Ala. 274; *Wanhumer v. Harrington*, 20 Mo. App. 297; *Houghtaling v. Hills*, 59 Iowa, 287; *Dalton v. Thurston*, 15 R. I. 418; *Reticker v. Kilyentin*, 26 Ill. App. 33; *Ide v. Gray*, 11 Vt. 615; *Wright v. Bourbon*, 50 Vt. 494; *Brainard v. Van Dyke*, 71 Vt. 359.

March M. Wilson for the plaintiff.

The defendant's discharge in bankruptcy is no bar to the liability described in the declaration. *Forsyth v. Vermehyr*, 177 U. S. 177; *Stranger v. Breadner*, 114 U. S. 555; *Ames v. Moir*, 138 U. S. 312; *Frey v. Terry*, 8 Am. B. R. 201; *Dar-*

ling v. Woodward, 54 Vt. 101; 10 Bump's Bankruptcy 241; Brandenburg's Digest, 169, Art. 250.

TYLER, J. It is alleged in the amended count that the defendant, on December 19, 1904, at Randolph, sought to buy of the plaintiff a large number of sheep of the value of twelve hundred dollars; that the plaintiff refused to sell them to him unless he then and there paid for them the sum named,—that the plaintiff refused to trust the defendant. It is further alleged that the defendant then and there falsely, fraudulently, and deceitfully represented to the plaintiff that one Hollis of Boston, Massachusetts, had mailed to him a check for fifteen hundred dollars, given by the New England Dressed Meat and Wool Company, which check would be delivered by regular course of mail at Randolph at or about five o'clock in the afternoon of that day; that the check was for the sheep and would be delivered to the plaintiff on its arrival as aforesaid; that the plaintiff knew that Hollis was the general manager of said Company, and that the Company was financially responsible and that its check was worth that sum in cash. It is further alleged that the plaintiff believed and relied upon these representations and in reliance upon them delivered the sheep to the defendant, who then and there converted them to his own use. It is alleged that the check had not been mailed; that the defendant knew that fact, and that he made the representations with the deceitful and fraudulent purpose of getting possession of the sheep and of converting them to his own use; that the defendant has never paid the plaintiff anything for the sheep and that the plaintiff has never received anything for them.

The defendant pleaded the general issue, and, in bar of the action, his discharge in bankruptcy. To this plea the

plaintiff demurred, and the question is whether the plaintiff's cause of action was discharged by the defendant's discharge in bankruptcy. The suit was pending when the bankruptcy proceedings were commenced.

The declaration presents a case containing all the elements of fraud; a false representation made by the defendant, he at the time knowing it to be false. It was made to deceive the plaintiff and it did deceive him, for he believed it to be true and so believing delivered the property to the defendant.

In Story's Eq. Jur., section 186, the definition of fraud is given as the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat or deceive another.

The case is like *McCrillis v. Allen*, 57 Vt. 505, where the defendant, by falsely representing himself to be one of a firm of produce commission merchants in Boston, induced the plaintiff to send poultry to said pretended firm to be sold on commission, with the fraudulent purpose of getting possession of it without paying for it, there in fact being no such firm. *Darling v. Woodward*, 54 Vt. 101; *Childs v. Merrill*, 63 Vt. 463.

The declaration does not allege a sale of the property upon the defendant's promise to pay for it, but it alleges in apt terms the obtaining of the property by the defendant by means of his false and fraudulent representations. The intention to deceive, which is a characteristic of fraud, is alleged, and the successful accomplishment of the fraudulent purpose.

Lord Hardwick said in *Lawley v. Hooper*, 3 Atk. 278: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the

equity of the court should be found out." Again he said, "Fraud is infinite." In Bigelow on Fraud, 3, it is said that judges have declined to attempt a definition, partly on the ground of hopelessness and partly from supposed danger. But while it may be difficult to frame a definition applicable to all cases in their varying circumstances, all courts agree as to some of the essential elements of fraud.

The U. S. Bankruptcy Law of 1898, as amended by the Act of 1903, seems sufficiently explicit in defining the kind of fraud that will prevent a debtor from obtaining a discharge. It says: "A discharge in bankruptcy shall release a bankrupt from all his provable debts except such as * * * are liabilities for obtaining property by false pretenses or false representations." But plain as this language is the Supreme Court has had occasion to construe it. In *Neal v. Clark*, 95 U. S. 704, 24 L. ed. 586, the Court said it meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist, without the imputation of bad faith or immorality. The rule is restated in *Ames v. Moir*, 138 U. S. 306, 34 L. ed. 951. In *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, the Court held that: "A representation as to a fact, made knowingly, falsely and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong." The facts alleged bring the present case clearly within these rules. As the Court said in the case last cited, "It is so plainly a fraud of that description that its mere statement obtains our ready assent."

Judgment affirmed and cause remanded.

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Privilege of a non-resident witness from service of summons in a civil case may not be pleaded in abatement. *Wilkins' Admr. v. Brock*, 57.

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APPEAL AND ERROR.

See "ASSAULT AND BATTERY"; "ATTORNEY AND CLIENT"; "CRIMINAL LAW"; "INTOXICATING LIQUORS"; "LIMITATION OF ACTIONS"; "NEW TRIAL"; "PROBATE COURT"; "TRIAL."

§ 1. Decisions Reviewable.

The Supreme Court will review only such questions as the record shows were decided by the county court. *Hogan & Hogan v. Sullivan*, 36.

Questions as to the admissibility and sufficiency of evidence in an action of book account heard on the report of an auditor, *held* not open to consideration on exception. *Ibid.*

The statement by an auditor in his report that, "all questions of law presented by the foregoing facts are submitted to the court", submitted to the court only the question of what judgment should be entered on the report. *Ibid.*

Where a bill of exceptions has been allowed, signed, and filed within the time prescribed by law, the Supreme Court will assume that the bill was submitted to the adverse party within the time prescribed by County Court Rule 29, or that the case was properly taken out of the rules by the presiding judge. *Boyce v. Bolston*, 40.

An objection to the admission of evidence cannot be reviewed where no exception was taken to the court's ruling at the trial. *Green v. Dodge*, 73.

Where all the evidence is not referred to in the bill of exceptions, the overruling of a motion for a verdict against one of the defendants cannot be reviewed. *McQuiggan v. Ladd*, 90.

The ruling of the trial court on the question of remoteness is not, ordinarily, reviewable. *Ibid*.

The recommittal of a master's report being within the discretion of the chancellor, will not be reviewed unless abuse of discretion appears. *Allen's Admr. v. Allen's Admrs.*, 173.

A master's findings will not be reviewed by the Supreme Court unless fraud or corruption is shown. *Ibid*.

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An exception to the refusal to give certain requested instructions held too general. *White v. Lumiere North American Co.*, 206.

§ 3. Record and Proceedings not in Record.

Where the record of the trial was referred to for a full statement bearing on an exception to the admission of evidence, but was not furnished, the exception would not be reviewed. *Green v. Dodge*, 73.

A bill of exceptions to the admission of conversations between witness and defendant, failing to show the subject-matter of the conversation, or what was said on the different occasions to which refer-

ence was made, *held* insufficient to justify a review of the ruling. *Ibid.*

Where the bill of exceptions states only that "at the end of defendant's case" plaintiff moved for a verdict against defendant, which motion was denied subject to plaintiff's exception, but the evidence is not referred to, the exception is not well taken. *McQuiggan v. Ladd*, 90.

Error must be affirmatively shown by the record; it will never be presumed. *Cushman v. Davis*, 111.

Where all the evidence is not referred to in the bill of exceptions, the overruling of a motion for a directed verdict against one of the defendants cannot be reviewed. *McQuiggan v. Ladd*, 90.

Judgment can never be arrested except for matters apparent on the fact of the strict record; hence a motion in arrest of judgment, on the ground that there was no evidence tending to prove the crime charged, was properly overruled. *State v. Burns*, 272.

The Supreme Court will not consider questions relating to the charge of the court, outside of the ground specified in the exceptions. *Sears v. Duling*, 334.

Where it does not appear what the answer of a witness would have been if the question had been allowed, there was no error in excluding the question. *Pond v. Pond's Est.*, 352.

Where the record does not disclose the ground upon which offered evidence was excluded, and there is any ground to justify the ruling, error does not appear. *Foss v. Smith*, 434.

Where the record does not show that an exception was taken to the overruling of a motion in arrest of judgment, that question will not be reviewed. *Dunbar v. Central Vermont Ry. Co.*, 474.

§ 4. Review.

In an action for rent under a lost lease, evidence that plaintiff's agent had a talk with defendant concerning a carriage left by plaintiff on the leased premises, without any attempt to show what the talk was, *held* harmless. *Green v. Dodge*, 73.

Cross-examination in view of the answer *held* harmless. *Grout v. Moulton*, 122.

Error in admitting evidence *held* not cured by instructions to disregard it. *Ibid.*

Admission of evidence on re-examination *held* not to be considered error, where it is not shown that it was not made admissible by cross-examination. *Ibid.*

Where the transcript of evidence is not furnished the Supreme Court, *held* presumable that there was evidence to support the verdict. *State v. Burns*, 272.

The admission of evidence not relating to the issues, but not prejudicial, is no ground of reversal. *McGowan v. Bowman*, 295.

An instruction that the jury should disregard certain evidence *held* not to have cured the effect of certain incompetent evidence. *Viles v. Barre and Montpelier etc. Co.*, 311.

An exception to a charge of malice in an action for slander held untenable. *Sears v. Duling*, 334.

On appeal from a decree in equity, *held*, that it would be presumed, in order to sustain the decision, that the court below drew certain inferences from the facts reported by the master. *Davenport v. Crowell*, 419.

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§ 1. Civil Liability.

In an action for assault the burden *held* on the defendants to show that one of them filing a plea of *son assault de mesme*, used no more force than was reasonably necessary in his own self-defence. *McQuiggan v. Ladd*, 90.

In an action for assault evidence that plaintiff was intoxicated, that he was ugly when under the influence of liquor, and that such traits of character were known to the person committing the assault *held* admissible. *Ibid.*

- In an action for assault it was not necessary in order to justify the admission of evidence concerning plaintiff's character for quarrelsomeness when intoxicated, that defendant should have had knowledge of the details of the occurrences indicating such character. *Ibid.*
- Evidence that prior to assault complained of, defendants' parents had cautioned them concerning their conduct toward plaintiff, *held* harmless. *Ibid.*
- An instruction authorizing defendant to use such force in self-defence of an assault, as he honestly believed to be necessary in the circumstances *held* error. *Ibid.*
- In an action for assault wherein defendant justified on the ground of self-defence, and claims that his conduct was affected by his knowledge that plaintiff was a quarrelsome and dangerous man, both plaintiff's real and reputed character may be involved; and defendant may prove plaintiff's real character by specific instances of its exhibition, and his like reputed character by reputation. *Ibid.*
- In an action for assault and battery, plaintiff's offer to show merely "his pecuniary condition at the time of the assault and after" was properly excluded. *Ibid.*
- The amount of force which a person is justified in using in self-defence is that force which reasonably appears to him in the circumstances to be necessary for his protection. *Ibid.*

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See "CONSTITUTIONAL LAW." § 1.

- An action under V. S. 1133, against members of an unincorporated association to recover on a judgment against the association after service on it under V. S. 1099 *held* not based upon the same cause of action as that upon which the original judgment was obtained. *Patch Mfg. Co. v. Capeless*, 1.
- Where judgment is obtained against an unincorporated association under V. S. 1099, *held* that only those members are liable in supplemental proceedings under V. S. 1183 who were members when the liability merged in the judgment was created. *Ibid.*
- An action under V. S. 1183, against the members of an unincorporated association to enforce individual liability on a judgment obtained against the association under V. S. 1099, *held* properly brought by trustee process under V. S. 1304. *Ibid.*

An unincorporated association is fundamentally a large partnership. *Ibid.*

The statutory liability of members of an unincorporated association under V. S. 1099 is contractual. *Ibid.*

Under V. S. 1183, where execution on judgment against an association is returned unsatisfied, supplemental suit may be brought against one or any number of the associates, who were such when the liability merged in the judgment was created, to enforce their individual liability. *Tarbell & Whitham v. Gifford*, 369.

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See "EVIDENCE" § 5.

§ 1. Assignment, Administration, and Distribution of Bankrupt's Estate.

A chattel mortgage on after-acquired property, under which the mortgagee has taken possession, held valid as against the mortgagor's trustee in bankruptcy, unless the possession was taken to afford a preference, though acquired within four months prior to the date of the mortgagor's petition in bankruptcy, and with knowledge of his insolvency and his contemplated bankruptcy proceedings. *Mower v. McCarthy*, 142.

The amendment of 1905 to § 60a of the Federal Bankruptcy Act, declaring that where a preference consists of a transfer, the four months' period shall not expire until four months after the date recording or registering is required, *held* inapplicable to an oral chattel mortgage. *Ibid.*

A trustee in bankruptcy is the successor to all the rights which the bankrupt possessed in his non-exempt property; and in replevin by the trustee against the third person to recover such property, the trustee must recover through the bankrupt's title; hence, the bankrupt's declarations against his title to such property, made while it was in his possession and before his bankruptcy, are admissible in favor of the defendant. *Ibid.*

§ 2. Rights, Remedies and Discharge of Bankrupt.

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§ 1. Requisites and Validity.

An agreement between father and son for security for a loan on personal property not yet purchased *held* a valid common-law mortgage, though not in writing. *Mower v. McCarthy*, 142.

Where it is agreed that after-acquired property shall be subject to the lien on a mortgage, such property on the mortgagee taking possession, becomes subject to the lien of the mortgage as of date thereof. *Ibid.*

A chattel mortgage on a stock of goods may be validly made to operate and cover on goods subsequently purchased to replenish the stock. *Ibid.*

The holder of an oral chattel mortgage on a stock *held*, on the mortgagor's default, entitled to take possession as of the date of the mortgage as against the mortgagor's creditors. *Ibid.*

It cannot be held, as matter of law, that such a mortgage is fraudulent and void as to the other creditors of the mortgagor. That is a question for the jury. *Ibid.*

CITIZENS.

Where it appears only that a person is a resident of this State, he will be presumed to be also a citizen thereof. *State v. Jackson*, 504.

Where it appears that a resident of this State was born in a foreign country, it will be presumed that he is still a citizen of that country. *Ibid.*

One residing in Massachusetts before and after the Declaration of Independence *held* to be deemed a citizen of the United States. *Ibid.*

The removal to Canada of an American citizen during minority *held* not to divest him of such citizenship. *Ibid.*

The mere removal to Canada of one who resided in Massachusetts before and after the Declaration of Independence *held* not to affect his status as a citizen of the United States. *Ibid.*

One *held* not deprived of his American citizenship by any act of his father subsequent to his birth. *Ibid.*

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Act of Congress, April 14, 1802, relative to citizenship of children born abroad of American citizens, *held* not to apply to the child of a father not born till after the passage of that Act. *Ibid.*

Evidence *held* insufficient to show that one who removed to Canada did anything to terminate his American citizenship before birth of his son. *Ibid.*

Declarations of an American citizen made after he removed to Canada *held* admissible to show that he did not terminate his American citizenship. *Ibid.*

An American citizen, though removing to Canada while an infant, *held* to have "resided" in the United States, so as to preserve to his son, born abroad, the right of American citizenship under Act of Congress of February 10, 1855. *Ibid.*

Evidence *held* to show that persons born abroad of American fathers made the necessary election to be American citizens. *Ibid.*

CONDITIONS.

See "MORTGAGES" § 1.

Regularly, when the grantor will take advantage of a condition broken, if he may enter, he must enter; and when he cannot enter, he must make claim, for a freehold and inheritance shall not cease without entry or claim. *Ordway v. Farrow*, 192.

At common law if a condition subsequent be possible at the time it was created, and afterwards become impossible by the act of the grantor, the estate of the grantor is not thereby divested. but becomes absolute. *Ibid.*

CONDITIONAL PARDONS.

See "PRISONS."

CONSPIRACY.

See "EVIDENCE" § 5.

CONSTITUTIONAL LAW.

See "STATUTES, CONSTRUCTION OF"; "HUSBAND AND WIFE," § 1.

§ 1. Due Process of Law.

V. S. 1099 providing for a judgment binding all members of an unincorporated association after service on an officer, does not violate the fourteenth amendment of the Federal Constitution as taking property without due process of law. *Patch Mfg. Co. v. Capeless*, 1.

CONTRACTS.

See "DEEDS" § 3; "INSURANCE" § 2; "MASTER AND SERVANT" § 1; "SALES."

§ 1. Requisites and Validity.

Inadequacy of consideration coupled with mental weakness justifying an inference that advantage had been taken of such weakness held sufficient to warrant a decree cancelling the contract. *Allen's Admr. v. Allen's Admrs.*, 173.

Incapacity sufficient to vacate a contract is such as leaves the party without sufficient understanding to know the consequence of his own act. *Ibid.*

Undue influence is either a species of fraud, or a kind of duress. In either case it comes in for the same consideration as fraud in general. *Heath v. Bank*, 301.

An offer need not be supported by a consideration; a consideration would only affect the right of revocation. *Ellis's Admr. v. Durkee*, 341.

An offer without a consideration may be revoked at any time, but, if seasonably accepted before revocation, it results in a binding contract. *Ibid.*

A promise to pay after six months a certain amount for oil stock held good as a continuing offer, though not supported by any consideration. *Ibid.*

An agreement for services *held* founded on a valid consideration. *Pond v. Pond's Est.* 352.

§ 2. Construction and Operation.

Where the case turns on the proper conclusion to be drawn from a series of letters taken in connection with other facts and circumstances, the case may properly be submitted to the jury. *White v. Lumiere North American Co.* 206.

§ 3. Rescission and Abandonment.

The parties to a written contract may rescind the same by mutual consent, and thereby render it without force. *Davenport v. Crowell*, 419.

An agreement by the parties to a written contract to rescind the same may be shown by such circumstances or by such course of conduct as clearly indicates the intention of the parties that it shall so operate. *Ibid.*

On an issue as to whether a written contract had been rescinded by mutual consent of the parties, evidence considered, and *held* sufficient to show such to have been the case. *Ibid.*

§ 4. Performance or Breach.

Where one party to an executory contract prevents its performance, or puts it out of his power to perform on his part, the other party may treat the contract as thereby terminated, and sue immediately for whatever damage he has suffered thereby. *White v. Lumiere North American Co.*, 206.

§ 5. Actions for Breach.

V. S. 2440, making the estate of a deceased joint obligor liable for the debt, does not remove the liability of the survivor for the whole debt. *Hogan & Hogan v. Sullivan*, 36.

Under V. S. 2440, a creditor may prove his debt against the estate of a deceased joint promisor, and also sue the survivor for the whole debt. *Ibid.*

Evidence of one contract, though nothing had been done under it, *held* admissible to show breach of another contract. *Grout v. Moulton*, 122.

Under the facts, plaintiff in an action of general assumpsit after his breach of an entire contract, *held* entitled to a *quantum meruit* recovery, which is the value of the benefit conferred on defendant, less his damage caused by plaintiff's failure of complete performance. *Viles v. Barre & Montpelier etc. Co.*, 311.

In assumpsit for a *quantum meruit* after breach of an entire contract by plaintiff, certain evidence *held* properly admitted as tending to show that the plaintiff's failure was not due to an absence of good faith. *Ibid.*

Where plaintiff has tried exactly to perform his entire contract, but has been prevented from complete performance by causes beyond his control, and defendant has voluntarily received the benefit of plaintiff's efforts to perform fully, plaintiff may recover *quantum meruit*. *Ibid.*

In an action upon an offer to pay for certain oil stock after six months, letter written by person making the offer *held* admissible as tending to explain delay in acceptance. *Ellis's Admr. v. Durkee*, 341.

Person making offer to pay for certain oil stock, who denied such offer when informed of its acceptance and refused to take the stock, *held* not entitled to a formal tender of the stock. *Ibid.*

CORPORATIONS.

§ 1. Officers and Agents.

Stockholders cannot lie by sanctioning, or by their silence acquiescing in, a practice that is *ultra vires*, and if it prove disastrous, institute an action against the corporation's officer who participated therein for the loss or damage resulting therefrom. *Davenport v. Crowell*, 419.

In an action by a stockholder against a director for loss sustained by the corporation through exchanging its notes with another corporation, evidence considered and *held* sufficient to warrant a finding that complainant had full knowledge of the practice of so exchanging notes, and that he acquiesced therein. *Ibid.*

COURTS.

Jurisdiction, see "INTOXICATING LIQUORS"; "CRIMINAL LAW" § 4.

§ 1. Nature, Extent, and Exercise of Jurisdiction in General.

An adjudication on habeas corpus before a judge of the Supreme Court as to the custody of the minor child of parents divorced by a decree of the county court *held* not to deprive the latter court of jurisdiction over the child's custody. *Whittier v. McFarland*, 365.

Of courts having jurisdiction of the same subject-matter, the one that first acquires jurisdiction retains it to the end, to the exclusion of others. *Ibid*.

CRIMINAL LAW.

See "APPEAL AND ERROR" § 3; "BIGAMY"; "BREACH OF THE PEACE"; "EVIDENCE" § 3; "INDICTMENT AND INFORMATION"; "INTOXICATING LIQUORS"; "LARCENY"; "PRISONS."

§ 1. Nature and Elements of Crime and Defences in General.

To constitute an attempt to commit a crime, the act must reach far enough towards the accomplishment of the desired result as to amount to the commencement of the consummation. *State v. Hurley*, 28.

That a prisoner procured tools adapted to jail breaking did not constitute an attempt to break jail. *Ibid*.

V. S. 4921 is aimed at blackmailing, and a threat of any public accusation is as much within its reason as one of a formal complaint instituting a criminal prosecution. *State v. Louanis*, 463.

§ 2. Former Jeopardy.

A conviction or acquittal bars only such offences as were put in issue on the former trial. *State v. Pianfetti*, 236.

A plea of former conviction *held* not sustained, in the absence of evidence establishing the identity of the offences. *Ibid*.

Where the respondent was convicted under an information containing six counts for the illegal sale of liquor, and the verdict did not designate the count on which the conviction was founded, the information on reversal stood for trial on all the counts. *Ibid*.

Where a plea of *autrefois acquit* or *convict* is determined against the accused, he is entitled to plead over and to a trial on his plea of not guilty. *Ibid*.

The general rule that in criminal prosecutions where the respondent relies upon a plea of former conviction of the same offence, if the same evidence required to support the crime charged in the one case will warrant a conviction in the other, does not apply in prosecutions for offences which by their nature are capable of repetition. *Ibid.*

§ 3. Evidence.

On a prosecution for threats with intent to extort money, *held* evidence of other threats was admissible to show intent. *State v. Louanis*, 463.

§ 4. Trial.

In a prosecution for larceny, evidence that the money taken could not not have been included in an item charged to respondent's brother-in-law *held* properly admitted in rebuttal. *State v. Baird*, 257.

The court, on motion in arrest after verdict, cannot consider the sufficiency of the evidence. *State v. Shappy*, 306.

A motion in arrest after verdict may raise the question of jurisdiction. *Ibid.*

A motion to quash an indictment is addressed to the discretion of the trial court, and its action thereon is not revisable. *State v. Louanis*, 463.

In a prosecution for threats with intent to extort money, the court *held* not required to define the word "extort." *Ibid.*

CULVERTS.

See "HIGHWAYS AND BRIDGES."

DAMS.

See "WATER AND WATER COURSES"; "EVIDENCE" § 3.

DAMAGES.

§ 1. Pleading, Evidence, and Assessment.

In an action where plaintiff after failure to perform an entire contract sought a recovery *quantum meruit*, certain evidence *held* erroneously excluded on the question of defendant's damages. *Viles v. Barre & Montpelier etc. Co.*, 311.

In an action upon an offer to pay for certain oil stock, assessments on such stock *held* not recoverable in the absence of allegations of special damages. *Ellis's Admr. v. Durkee*, 341.

In an action for damages for the loss of a horse, *held* that testimony of a witness as to the value of the horse about a year previous properly admitted. *McKenzie v. Boutwell & Varnum*, 383.

DEEDS.

See "CONDITIONS"; "EASEMENTS."

§ 1. Recording.

That a deed delivered to the grantee was not left for record until after the grantor's death did not prevent it from becoming operative at the date of its execution and delivery. *In re Lane's Est.* 323.

§ 2. Construction and Operation.

A deed of standing timber *held* to have created the same legal relation as in the case of an absolute conveyance with mortgage to secure the purchase money. *Ordway v. Farrow*, 192.

Under the facts, the grantee in a deed of timber *held* entitled to remove it within a reasonable time though the period prescribed by the deed has expired. *Ibid.*

§ 3. Pleading and Evidence.

In an action to set aside certain deeds and a power of attorney, evidence *held* to support a finding that the instruments were obtained by reason of the mental incapacity of the grantor combined with undue influence exerted on him by his wife. *Allen's Admr. v. Allen's Admrs.*, 173.

DEER.

See "GAME LAWS."

DIVORCE.

See "COURTS" § 1.

DOMICILE.

The occupant of a house located on the boundary line between two towns *held* a resident of the town in which six-sevenths of the house was located. *East Montpelier v. City of Barre*, 542.

EASEMENTS.

Where a deed conveyed a right of way which was pointed out to the grantees at the time, and was reasonably sufficient grantees *held* to have acquiesced in its location. *Peduzzi v. Restull*, 349.

Deed providing that the jet of the grantors' house which they retained, and the jet of the house on the land conveyed, should remain as they then were, *held* not to restrain the right of the owners of either property to build additions on their own land. *Ibid.*

ESCAPE.

See "CRIMINAL LAW" § 1.

EQUITY.

See "APPEAL AND ERROR" § 14; "CONTRACTS" § 1; "DEEDS" § 3; "HUSBAND AND WIFE" § 1; "INJUNCTION"; "MORTGAGES" § 1; "PARTNERSHIP"; "PROBATE COURT"; "TRUSTS"; "JURISDICTION"; "WILLS."

§ 1. Jurisdiction, Principles, and Maxims.

It is a fundamental principle of equity jurisprudence that a person having a legal right shall not be permitted to use it to accomplish an injustice. *Ordway v. Farrow*, 192.

Where a bill showed a dispute as to the location of a boundary, and that the defendant was building a fence on a part of the land claimed by the orator, it was no ground for an injunction or for the interposition of equity. *Watkins v. Childs*, 234.

It is not the business of equity to try titles to real estate. *Ibid.*

The fact that an annuitant under a will needs money *held* not to authorize a court of chancery to take charge of the administration of the estate. *Clark v. Peck's Exrs.* 275.

A court of chancery *held* to have no jurisdiction as to an election of a widower in relation to taking under his wife's will. *Ibid.*

An alleged conspiracy between executors of a will *held* not to authorize chancery to take jurisdiction; the proper remedy being the removal of the executors by the probate court under V. S. 2380, 2384. *Ibid.*

The avoidance of a multiplicity of suits *held* not a sufficient ground to authorize a court of equity to take charge of the administration of an estate. *Ibid.*

The court of chancery can intervene in the settlement of an estate only in aid of the probate court. *Ibid.*

Equity does not have jurisdiction over all trusts. It has no jurisdiction over trusts given to the exclusive jurisdiction of probate or other courts, nor of money held in trust. *Ibid.*

To give a court of equity jurisdiction of a trust it must appear that the trust is one of which that court has either conclusive, auxiliary, or concurrent jurisdiction. *Ibid.*

The rule that, where one by his fraud has gained an unfair advantage in an action at law equity will interfere to prevent him from taking the benefit thereof, applies where a judgment at law acquired by fraud is relied on as a defence. *Scoville v. Brock*, 449.

To warrant the dismissal of a bill for want of equity, it is not enough that the orator has a remedy at law; it must be plain and adequate, and as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity. *Heath v. Bank*, 301.

Where one by fraud has gained an unfair advantage in a proceeding at law, equity will interfere to prevent him from reaping the benefit of the advantage thus obtained. *Scoville v. Brock*, 449.

§ 2. Pleading.

Where a demurrer to the whole of a bill in equity is sustained, the orator must make a new case; but he may do so by amending the rejected bill, and defendant's answer or other reply to the original bill will be treated as dropped from the pleadings. *Scoville v. Brock*, 449.

A defendant in equity *held* entitled to answer anew to an amended bill filed by leave of court after the sustaining of a demurrer to the original bill. *Ibid.*

§ 3. Masters and Commissioners, and Proceedings before Them.

A replication to an answer filed with the master after the case has been referred *held* ineffective. *Cushman v. Davis*, 111.

Failure to file a replication till suit had been referred to a master, *held* cured by leave to file *nunc pro tunc* obtained from the chancellor under Chancery Rule 45. *Ibid.*

Under V. S. 930, a master *held* not bound to state his decision in admitting or rejecting evidence, but might treat the objection as waived. *Allen's Admr. v. Allen's Admrs.*, 173.

It is not legal error for a master to omit to report all the facts on which an ultimate finding is based, though the finding is a conclusion resulting from questions of mixed law and fact. *Ibid.*

A court of equity *held* entitled to infer such facts from those reported by a master as necessarily or fairly result therefrom. *Davenport v. Crowell*, 419.

ESTOPPEL.

Estoppels operate only in favor of parties or their privies. "Privy" denotes mutual or successive relationships to the same property rights; and privies in representation include executor and testator, and administrator and intestate. *Pond v. Pond's Est.*, 352.

An estoppel is something more than an admission. An admission is mere evidence, while an estoppel gives rise to substantive rights. *Ibid.*

He who relies upon an estoppel *in pais* must not only show an express or implied admission, but also reliance thereon to his injury in ignorance of the truth. *Ibid.*

A person *held* estopped by silence from asserting a claim against the estate of a decedent. *Ibid.*

An executor contesting the allowance of a claim *held* entitled to avail himself of the defence of estoppel. *Ibid.*

ESTRAYS.

See "HIGHWAYS AND BRIDGES."

EVIDENCE.

See "ASSAULT AND BATTERY"; "CITIZENS"; "BILLS AND NOTES" "CONTRACTS" §§ 3, 5; "CRIMINAL LAW" § 3; "DAMAGES" § 1; "DEEDS"

§ 3; "INSURANCE"; "LARCENY"; "LIMITATION OF ACTIONS";

"MASTER AND SERVANT" §§ 1, 2; "NEGLIGENCE";

"PHYSICIANS AND SURGEONS"; "WITNESSES."

§ 1. Judicial Notice.

Courts will take judicial notice of the population of towns as shown by the last federal census. *Page v. McClure*, 83.

§ 2. Presumptions.

When a fact that in its nature is continuous is once established, the general rule is that it is presumed to continue till the contrary is shown. *State v. Jackson*, 504.

Residence once established *held* presumed to have continued till the contrary is shown. *Ibid.*

Citizenship, once established, *held* presumed to continue till the contrary is shown. *Ibid.*

§ 3. Relevancy, Materiality, and Competency in General.

Where, in an action for rent under a lost lease, the agreed rental was in dispute, plaintiff *held* entitled to show the reasonable value of the property as showing the probable agreed rental. *Green v. Dodge*, 73.

In an action for rent under a lost lease, evidence that in certain conversations had with defendant concerning the rented premises and the payment of the rent due, he had never made any claim that the premises were rented to his wife, *held* admissible to rebut such contention on the trial. *Ibid.*

The word "character" as applied to man, may mean either actual character or reputed character. In impeaching a witness by showing his general reputation only reputed character is involved, and so only general reputation is admissible to prove it. *McQuiggan v. Ladd*, 90.

But in an action for assault and battery wherein defendant justifies on the ground of self-defence, and claims that his conduct was influenced by his knowledge that plaintiff was a dangerous man, both real and reputed character may be involved; and the one may be proved by specific instances and the other by reputation. *Ibid.*

Statements *held* admissible as *res gestae* in an action on a written contract. *Grout v. Moulton*, 122.

Certain declarations *held* admissible as part of the *res gestae*. *Jericho v. Huntington*, 329.

In a suit involving the residence of a pauper, proof of a statement made by the pauper *held* admissible as a part of the *res gestae*. *Ibid.*

On an issue as to the height at which the owner of a dam was entitled to maintain the same, a certain entry on the records of the town, connected with a deed under which the dam owner claimed, *held* not competent evidence. *Dutton v. Stoughton*, 361.

§ 4. Admissions.

In a proceeding to establish a claim against a decedent's estate, certain evidence *held* not to amount to an admission on the part of the claimant by reason of silence. *Pond v. Pond's Est.*, 352.

On defendant filing an answer anew to an amended bill, the answer to the original bill *held* provable like any other document not embraced in the record. *Scoville v. Brock*, 449.

§ 5. Declarations.

Where a son executed a valid oral chattel mortgage to his father, the son's subsequent statements showing his intent to defraud his creditors, were inadmissible against his father, in the absence of evidence tending to connect the father with such statements. *Mower v. McCarthy*, 142.

The mere relation of mortgagor and a mortgagee, in the absence of evidence of collusion between them, *held* not to create such a privity of estate as entitled the mortgagor's trustee in bankruptcy to prove the declarations of the mortgagor against the mortgagee. *Ibid.*

In an action by a mortgagor's trustee in bankruptcy to recover the property taken by the mortgagee, a declaration by the mortgagor that the mortgagee had loaned him certain money and was entitled to take possession of the property at any time *held* admissible as a declaration against interest. *Ibid.*

Proof sufficient to establish *prima facie* the fact of a conspiracy must be introduced before declarations of an alleged conspirator are competent. *Ibid.*

Declarations of a deceased person who was born an American citizen, made while he was residing abroad, evincing an intention to adhere to the allegiance of his birth, are admissible upon the question of his then citizenship. *State v. Jackson*, 504.

§ 6. Hearsay.

One who puts evidence into a case, or allows it to be admitted without objection, *held* not afterwards entitled to object to it as hearsay. *State v. Jackson*, 504.

§ 7. Documentary Evidence.

On the issue of the value of furniture at a particular time, it was not prejudicial error to exclude a photograph thereof taken at that time. *Foss v. Smith*, 434.

Where defendant files an answer to an amended bill in equity, the answer to the original bill is provable like any other document not embraced in the record. *Scoville v. Brock*, 449.

On an issue as to the height at which the owner of a dam was entitled to maintain it, a certain entry on the town records, connected with the record of the deed under which the dam owner claimed, *held* not evidence. *Dutton v. Stoughton*, 361.

A mortgagor who executed a real estate mortgage conditioned for the performance by a third person of the latter's stated agreement with the mortgagee, stands as surety for such third person; and in a suit to foreclose said mortgage, where the mortgagor defends on the ground that such third person is not liable on said contract, the latter's declarations tending to prove said contract are not hearsay, and are admissible against the mortgagor. *Jangraw v. Perkins*, 107.

§ 8. Parol or Extrinsic Evidence Affecting Writings.

Parol evidence to show what the parties intended by unequivocal words in a written contract, *held* inadmissible. *Grout v. Moulton*, 122.

Direct oral statements of intention in respect of the subject-matter of a written contract are admissible only when the language used is equally applicable in all parts to more than one external object. *Ibid*.

A written contract examined and held dispositive, and not merely evidentiary. *Ibid*.

EXCEPTIONS, BILL OF.

See "APPEAL AND ERROR" § 1.

EXECUTORS AND ADMINISTRATORS.

See "EQUITY" § 1; "ESTOPPEL"; "INJUNCTIONS" § 2; "PROBATE COURT";
"TRUSTS."

§ 1. Accounting and Settlement.

An executor failing to file the accounts required by statute *held* not necessarily barred from compensation. *In re Lane's Est.*, 323.
An executor *held* not liable for the rental value of certain property after his conveying the same to a legatee in payment of a legacy. *Ibid.*

FINDINGS OF FACT.

See "TRIAL" § 6.

GAME LAWS.

Under No. 94, Acts 1896, and No. 127, Acts 1904, it is unlawful for any person to kill a wild deer except during the last week in October in each year, Sunday excepted. *State v. Burns*, 272.

GUARDIAN AND WARD.

See "LIMITATION OF ACTIONS."

Inability to vacate a probate decree allowing a guardian's final account will not prevent affirmative relief in equity. *Scoville v. Brock*, 449.

The Statute of Limitations does not begin to run against a ward seeking to set aside a decree allowing his guardian's final account, based on the fraud of the guardian, until the influence of the confidential relation has ceased. *Ibid.*

The influence of a guardian over his ward is presumed to continue for a time after the guardianship has ceased. *Ibid.*

V. S. 2810, *held* to relate only to a further hearing in the probate court in respect of the accounts of guardians. *Ibid.*

A guardian *held* not liable to his ward for loss of property, where he exercised the requisite care in the management of the property in his hands. *Ibid.*

Whether a guardian exercised proper diligence in the management of the property of his ward in his hands *held* a question of fact. *Ibid.*

In a suit to set aside a decree allowing a guardian's final account, based upon the negligence of the guardian in the management of the estate in his hands, the guardian has the burden of proving that he exercised the requisite diligence. *Ibid.*

HABEAS CORPUS.

See "COURTS" § 1.

HIGHWAYS AND BRIDGES.

Whether a mare which, coming out of a pasture and starting for the house, walked off a defective bridge in the highway, was a "traveler" on the bridge within the meaning of V. S. 3490, *held* to depend on whether her owner was guilty of contributory negligence. *Howrigan v. Bakersfield*, 249.

Whether the owner of a mare which came out of an open pasture, and, starting for the house, walked off a defective bridge in the highway, was guilty of contributory negligence, *held* a question for the jury. *Ibid*.

Where horses or cattle escape from their owner's enclosure into the highway, without any fault on his part, they are not "at large" or "estrays" within the legal sense of those terms, and the owner is entitled to have the town protect them as travelers. *Ibid*.

Towns are bound to keep their highways in a reasonably safe condition with reference to such accidents as may fairly be expected to happen thereon. *Ibid*.

The words "bridge" and "culvert" as used in V. S. 3490 giving an action for damages caused by reason of the insufficiency of "any bridge or culvert," *held* not synonymous. *Cleveland v. Town of Washington*, 498.

In an action for injuries by defect in a bridge, defendant *held* not entitled to verdict on motion. *Ibid*.

In an action for injuries caused by defect in bridge, defendant *held* not entitled to verdict on motion. *Ibid*.

HOMESTEAD.

A husband's sole deed of the homestead is void. *Cushman v. Davis*, 111.

When a homestead ceases to be "used and kept" as such, it ceases to exist, regardless of whether another has been acquired. *Ibid*.

That a husband and wife left the homestead not intending to return, though at different times, *held* to constitute an abandonment under V. S. 2179. *Ibid*.

HUNTING.

See "GAME LAWS."

HUSBAND AND WIFE.

See "COURTS"; "DEEDS" § 3; "HOMESTEAD"; "WITNESSES."

§ 1. Disabilities and Privileges of Coverture.

A bill for specific performance of an agreement to convey land held maintainable notwithstanding the marital relation between the parties. *Kittredge v. Kittredge*, 337.

The unconstitutionality of No. 49, Acts 1896 *held* no defence to a bill by a wife to compel a husband to perform a contract between them for the conveyance of real estate. *Ibid*.

§ 2. Enticing and Alienating.

In an action for alienation of a wife's affections by committing adultery with her, evidence of the husband's misconduct, short of his consent to defendant's acts, *held* no defence, but only admissible in mitigation of damages. *Lewis v. Roby*, 487.

INDICTMENT AND INFORMATION.

See "RECEIVING STOLEN GOODS."

An indictment charging respondent with holding himself out to the public as a physician without having received a license, *held* insufficient for not showing the particulars. *State v. Wilson*, 379.

If everything necessary to constitute the offence is charged or necessarily implied by following the language of the statute, an indictment in the words of the statute is sufficient, otherwise not. *Ibid.* and *State v. Banister*, 524.

Defects in indictment *held* not ground for objections to evidence after joinder of issue. *State v. Louanis*, 463.

Motion in arrest of judgment *held* the only proper remedy, after joinder of issue, for defects in the indictment. *Ibid*.

The word "feloniously" when used in an indictment both characterizes the crime and charges an unlawful intent. *State v. Banister*, 524.

INJUNCTION.

§ 1. Subjects of Protection and Relief.

Equity *held* to have jurisdiction to restrain an action under a judgment at law. *Ordway v. Farrow*, 192.

§ 2. Actions for Injunctions.

A bill seeking an injunction restraining waste of an estate *held* not to show clearly that the possession was in defendant as alleged therein. *Clark v. Peck's Exrs.*, 275.

A bill seeking an injunction restraining waste of an estate *held* to show on its face an adequate remedy at law by the removal of the executors under V. S. 2380, 2384. *Ibid.*

Complaint, in a suit to restrain the holder of certain notes from enforcing the same, *held* entitled to an injunction and a decree cancelling the notes and requiring the delivery of collaterals, on the ground that they were obtained by undue influence. *Heath v. Bank*, 301.

INSURANCE.

See "MORTGAGES" § 1.

§ 1. Avoidance of Policy for Misrepresentation, Fraud, or Breach of Warranty or Condition.

Illness, when applied to the warranty of an insured in a life policy that he was of sound health and had never had consumption, defined. *Schofield's Adm'r. v. Ins. Co.*, 161.

Untrue answers in an application for life insurance *held* to render the policy void. *Ibid.*

In an action on a life policy, certain evidence *held* not to show the falsity of the statement of the assured in the application in respect of having consulted physicians. *Ibid.*

§ 2. Action on Policies.

In an action on a life policy evidence *held* to require the submission to the jury of the issues whether insured's statement that he had never had consumption and had not consulted physicians were false. *Schofield's Adm'r. v. Ins. Co.* 161.

In an action on a life policy, certain evidence *held* not to prove that insured had consumption and that his statement in his application on that subject was false. *Ibid.*

An insurer, claiming that the answers of the insured in the application for insurance were false, has the burden of proving that fact. *Ibid.*

An action on a mutual benefit certificate issued to a member, *held* required to be brought by the legal representative of the member, the certificate being considered a specialty. *Morrill's Admr. v. Catholic Order of Foresters*, 479.

No. 121, Acts 1896, relating to declarations in actions on policies of insurance, *held* not applicable to a mutual benefit certificate under seal. *Ibid*.

INTEREST.

See "MORTGAGES" § 2.

INTOXICATING LIQUORS.

See "CRIMINAL LAW" § 2.

§ 1. Criminal Prosecutions.

No. 115, Acts 1904, §§ 103, 114, *held* not to give the city court of the city of St. Albans jurisdiction to try one charged with furnishing intoxicating liquors contrary to law. *State v. Shappy*, 306.

JAIL BREAKING.

See "CRIMINAL LAW" § 1.

JOINT PROMISORS.

See "CONTRACTS" § 5.

JUDGMENT.

See "ACCORD AND SATISFACTION"; "ATTORNEY AND CLIENT"; "COURTS"; "EQUITY" § 1; "INJUNCTION" § 1.

§ 1. Merger and Bar of Causes of Action and Defences.

The equitable right of redemption possessed by a grantee in a deed of standing timber on condition subsequent *held* not barred by a judgment in an action against him by the grantor, nor by the grantee's conduct in contesting the action. *Ordway v. Farrow*, 192.

LANDLORD AND TENANT.

See "EVIDENCE" § 3; "TRIAL" § 2.

LARCENY.

See "CRIMINAL LAW" § 4.

In a prosecution for larceny, evidence *held* to disclose a felonious taking. *State v. Baird*, 257.

In a prosecution for larceny from a firm, evidence concerning dissensions between members of the firm *held* irrelevant. *Ibid.*

LIENS.

See "RECEIVERS."

A person repairing mortgaged chattels at the request of the mortgagor acquires a lien thereon, subject to the mortgagee's right, and is entitled to the chattels as against the mortgagor. *Bergman v. Gay*, 262.

A mortgagor *held* not entitled to defeat the right of one having a lien for repairs on chattels mortgaged, by showing a subsequent sale of the chattels by the mortgagee. *Ibid.*

A lien arises at common law in favor of one who improves by his labor or expense the chattel of another at the owner's request, and V. S. 2279, which purports to give such a lien, is merely declaratory of the common law. *Ibid.*

LIMITATION OF ACTIONS.

See "GUARDIAN AND WARD"; "TRIAL" § 5.

The delivery of potatoes by defendant to plaintiff on plaintiff's account against defendant constituted a proper item of credit sufficient to stop the Statute of Limitations. *Green v. Dodge*, 73.
The burden of proof of a plea of limitation is on the party pleading it. *Ibid.*

The Statute of Limitations *held* not to begin to run against an action by a ward to set aside a decree allowing his guardian's final account until something occurred to raise a doubt in the mind of the ward as to the guardian's conduct. *Scoville v. Brock*, 449.

MECHANICS' LIENS.

See "RECEIVERS"; "LIENS"; "STATUTES, CONSTRUCTION OF."

Memorandum for mechanic's lien *held* substantially to comply with V. S. 2273. *Baldwin v. Spear Bros.*, 43.

Though the person asserting a mechanic's lien should be held to a reasonably strict compliance with the statutory requirements,

reasonable compliance is sufficient; nicety of form is not essential. *Ibid.*

The memorandum required by V. S. 2273 to be filed in the town clerk's office by one asserting a mechanic's lien need not recite the items of claimant's account, nor the terms of the contract, nor the date when the job was completed, nor specify what part of the claim is for materials and what part for labor. *Ibid.*

A mechanic's lien statement *held* not fatally defective for failure to specify whether the contract for work and materials furnished was in writing. *Ibid.*

A claim for extras *held* properly included in a mechanic's lien for the amount due under a building contract. *Ibid.*

MALPRACTICE.

See "PHYSICIANS AND SURGEONS."

MANDAMUS.

See "STATUTES, CONSTRUCTION OF."

§ 1. Subjects and Purposes of Relief.

A writ of mandamus against public officers is only available to enforce performance of existing legal duties. *Page v. McClure*, 83.

An allegation in a complaint for mandamus that defendants, acting as a board of civil authority of a town, were bound to canvass and count ballots at a local option election, *held* a conclusion of law which was not admitted by demurrer. *Ibid.*

That a board of civil authority of a town assumed to canvass votes cast at a local option election which they were not bound to do, *held* insufficient to subject them to a writ of mandamus to compel the completion of such act. *Ibid.*

On petition of a voter and taxpayer of a town, *held*, that mandamus would lie to compel the selectmen to call a special meeting for the election of officers; they not having been elected at a regular meeting under V. S. 2972. *Jenny v. Alden*, 156.

MASTERS IN CHANCERY.

See "APPEAL AND ERROR" § 4; "EQUITY" § 3.

MASTER AND SERVANT.

§ 1. The Relation.

Lease by a master of all its plant including a transfer of all its rights to plaintiff's services, *held* to terminate the contract of employment by the master. *White v. Lumiere North American Co.*, 206.

In an action for breach of a contract of employment, evidence of transactions by plaintiff after notice of his discharge *held* inadmissible to show that he was then acting for defendant. *Ibid.*

In an action for breach of contract of employment *held* to be of the essence of the contract that defendant should keep plaintiff in its service for the agreed term; and to that extent at least it was bound to perform, even if it was not also bound to furnish plaintiff with work during that period. *Ibid.*

In an action for breach of a contract of employment *held* that the master had power to dismiss the servant without cause, thereby subjecting the master to the consequences of violation of its contract; and after notice of his discharge the servant was not at liberty to disregard his dismissal by continuing his labor and claiming pay for it. *Ibid.*

A servant in the course of his employment being required to make daily trips to another town, *held* entitled to recover the reasonable cost of lunches obtained there during the noon hour. *Taylor v. St. Clair*, 536.

§ 2. Master's Liability for Injuries to Servant.

In an action by a quarryman for injuries received while drilling out a powder hole supposed to have been exploded, evidence examined, and *held* admissible to show foreman's superior knowledge. *McKane v. Marr & Gordon*, 13.

In an action for injuries received by a quarryman while cleaning out a powder hole, evidence examined, and *held* insufficient to show contributory negligence as matter of law. *Ibid.*

In an action for injuries received by a quarryman while cleaning out a powder hole supposed to have been exploded, evidence examined, and *held* insufficient to show assumption of risk as matter of law. *Ibid.*

In an action for injuries received by a quarryman in cleaning out a powder hole supposed to have been exploded, plaintiff had a right to presume that the foreman had ascertained whether the powder had exploded, and to rely on his assurance that it had. *Ibid.*

In an action for injuries to an electric lineman, defendant *held* en-

titled to have the defence of fellow servant submitted to the jury. *Sias v. Consolidated Lighting Co.*, 224.

In an action for injuries to an electric lineman, plaintiff *held* not guilty of contributory negligence in climbing the pole without making inspection, or in failing to adopt a safer method of work. *Ibid.*

The duty of the master to instruct an ignorant and inexperienced servant may arise in respect of an adult servant as well as in the case of a child; and where that duty exists and the master delegates its performance to a third person, the latter is, in respect thereof, a vice principal. *Ibid.*

Where a railroad employee was killed in a wreck occasioned by a defective rail, he did not assume the risk arising from such defect by remaining in defendant's employ, unless he had actual or imputed knowledge thereof. *Shattuck's Admr. v. Central Vermont Railway Co.*, 469.

The risk of injury to a conductor by a derailment of his train due to the unsoundness of the ties, *held* an extraordinary risk, existing by fault of the railroad. *Dunbar v. Central Vermont Ry. Co.*, 474.

A conductor suing for injuries caused by the derailment of his train due to the unsoundness of the ties, has the burden of proving that he did not assume the risk. *Ibid.*

In an action for injuries to a conductor caused by the derailment of his train, certain evidence *held* inadmissible to show that the derailment was an ordinary risk assumed by the conductor. *Ibid.*

In an action by a conductor for injuries caused by the derailment of his train, due to the unsoundness of the ties, evidence of the condition of the roadbed a year and a half after the accident, *held* properly excluded. *Ibid.*

The test of whether a servant assumed the risk of an extraordinary danger is, not whether he exercised care to discover the danger, for he has a right to assume that it does not exist; but whether he actually or presumably knew and comprehended it. *Ibid.*

MORTGAGES.

See "CHATTEL MORTGAGES"; "CONDITIONS"; "EVIDENCE" § 5;

"MANDAMUS."

§ 1. Rights and Liabilities of Parties.

Although the mortgagor failed to pay the note on the day appointed, and the legal estate thereby became vested in the mortgagee, the mortgagor still had an equitable right to redeem which the mortgagee was bound to respect. *Ordway v. Farrow*, 192.

Forfeiture consequent on the mortgagor's nonpayment on the day appointed is designed merely as a security for the enforcement of the obligation secured by the mortgage and equity will require that it be not perverted to a different and oppressive purpose. *Ibid.*

In a suit to foreclose a second mortgage *held* that the mortgagee was entitled to be subrogated to all the equitable rights of one, for whose support the first mortgage was conditioned. *Jamaica Sav. Bank v. Howard*, 372.

A mortgagee *held* on foreclosure not entitled to relief for taxes paid by him. *Ibid.*

A record of the second mortgage on a portion of the mortgaged property held constructive notice to the mortgagor's grantee, of the second mortgagee's equitable right to have the burden of the first mortgage, as between himself and mortgagor, cast on that property of the mortgagor not covered by the second mortgage. *Ibid.*

Where a mortgagee received the proceeds of a fire insurance policy on the mortgage premises at a time when there was nothing due on the mortgage debt, he could not apply it to the mortgage debt without the mortgagor's consent, but was required to hold and apply it in extinguishment of the mortgage debt as it matured. *Thorp v. Croto*, 390.

§ 2. Payment or Performance of Condition, Release, and Satisfaction.

Where a mortgagor did not pay or tender the amount of the mortgage note on the day appointed, but the mortgagee thereafter refused to receive a proper tender, he is not entitled to interest after the tender was made. *Ordway v. Farrow*, 192.

MUNICIPAL CORPORATIONS.

No. 165, Acts 1894, *held* ineffective to create a liability against the city of Barre for aid furnished to a pauper who was not a resident of

that city at the time the aid was required to be furnished. *East Montpelier v. City of Barre*, 542.

MOTIONS.

In arrest, see "CRIMINAL LAW" § 4; "INDICTMENT AND INFORMATION."

NEGLIGENCE.

See "HIGHWAYS AND BRIDGES"; "MASTER AND SERVANT" § 2.

§ 1. Actions.

The question of what is prudent and reasonable conduct in a case depending upon a variety of considerations, facts and circumstances, is one peculiarly for the jury. *Howrigan v. Bakersfield*, 249.

Where the standard of negligence is not prescribed, and there is a combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts or circumstances are so decisive one way or the other as to leave no room for opposing inferences. *Ibid.*

In an action for the loss of a horse while being used by defendants, evidence of a conversation with one defendant shortly after the accident *held* incompetent to show negligence of defendants. *McKenzie v. Boutwell & Varnum*, 383.

In an action for negligence resulting in the death of plaintiff's horse, *held*, that a conversation between plaintiff and one of defendants was properly admitted for a limited purpose. *Ibid.*

In an action for the loss of a horse, resulting from injuries received in defendants' roadway, *held*, that evidence that defendants repaired the road after the accident was admissible for a certain purpose. *Ibid.*

NEW TRIAL.

On a petition for a new trial on the ground of newly discovered evidence, the newly discovered evidence *held* of such a character as to create a strong probability of a different result on another trial, authorizing the granting of a new trial. *Foss v. Smith*, 434.

A party applying for a new trial on the ground of newly discovered evidence *held* not deprived of the right to a new trial on the ground that the newly discovered evidence was cumulative. *Ibid.*

On a petition for a new trial on the ground of newly discovered evidence *held* that the petitioner had exercised the requisite diligence. *Ibid.*

Where plaintiff recovered judgment for alienation of his wife's affections, the fact that he failed to obtain a divorce for her alleged adultery with defendant did not entitle the latter to a new trial. *Lewis v. Roby*, 487.

If the verdict of a jury can be supported on any rational view of the evidence, it should stand. *Ibid.* and *Coolidge v. Taylor*, 528.

A new trial granted on the ground of surprise in an action for the collection of taxes involving an issue as to the residence of defendant. *Coolidge v. Taylor*, 528.

Where defendant had knowledge of an issue at the beginning of the trial, and an opportunity during recess to procure evidence in support thereof, a strong case of diligence would be required to justify a new trial on the subsequent production of such evidence. *Taylor v. St. Clair*, 536.

A new trial for newly discovered evidence will not be granted unless it is probable that the newly discovered testimony will change the result. *Ibid.*

NOTICE.

See "MORTGAGES" § 1.

PARDONS.

See "PRISONS."

PARTNERSHIP.

See "ASSOCIATIONS"; "CONSTITUTIONAL LAW" § 1.

§ 1. Rights and Liabilities as to Third Persons.

Partnership debts are the debts of each partner *in solido*; and, at common law, either separate or joint creditors may attach and sell either separate or joint property, regardless of the equities existing between the partners. *Patch Mfg. Co. v. Capeless*, 1.

In equity, partnership property must be used to pay partnership debts, and to the extent that such debts are not fully paid by the partnership property, they stand the same as other debts against each partner's separate property. *Ibid.*

PAUPERS.

See "EVIDENCE" § 5; "MUNICIPAL CORPORATIONS."

In a suit involving the question of the residence of a pauper, certain evidence *held* inadmissible. *Jericho v. Huntington*, 329.

Where a pauper resided in a town at the time he removed to the plaintiff town, his residence was not changed by an alteration of the boundary of the city adjoining his former residence so as to include the same. *East Montpelier v. City of Barre*, 542.

PHYSICIANS AND SURGEONS.

See "INDICTMENT AND INFORMATION."

In an action against a physician for malpractice, evidence of discourteous acts by defendant toward plaintiff more than four months after defendant's connection with plaintiff's case had ceased, *held* inadmissible to prove ill will, or to sustain a count charging intentional injury. *Willard v. Norcross*, 546.

An opportunity by a physician to do malicious injury in January with manifestations of ill will five months later, *held* not to show that any improper surgical treatment was intentional. *Ibid*.

PLEADING.

See "ABATEMENT"; "EQUITY" § 2; "INDICTMENT AND INFORMATION"; "LIMITATION OF ACTIONS"; "MANDAMUS."

§ 1. Issues, Proof, and Variance.

In an action upon an offer to pay for certain oil stock after six months, although the declaration alleged that the consideration was the offeree's forbearance to sell the stock, yet as enough appeared in the declaration to show that the real consideration was the transfer of the stock, the objection of a variance was technical merely. *Ellis's Admr. v. Durkee*, 341.

§ 2. Demurrer.

In general assumpsit on a mutual benefit certificate, where defendant demanded and was granted oyer of the certificate and thereupon recited it in a demurrer to the declaration, the certificate was thereby made a part of the declaration, regardless of whether defendant was entitled to oyer. *Morrill's Admr. v. Catholic Order of Foresters*, 479.

PRESCRIPTION.

See "WATER AND WATER COURSES."

PRINCIPAL AND AGENT.

See "SALES."

§ 1. The Relation.

Evidence *held* sufficient to show agency. *Grout v. Moulton*, 122.

PRINCIPAL AND SURETY.

See "EVIDENCE" § 7.

PRISONS.

A deduction of time allowed a prisoner for good behavior pursuant to V. S. 5274, is not forfeited by a breach of a subsequent conditional pardon. *In Re McKenna*, 34.

Where a prisoner, who has been at large on a conditional pardon is recommitted to serve the remainder of his term, the time he has been so at large is not to be treated as time served on his sentence. *Ibid.*

PROBATE COURT.

See "EQUITY" § 1; "GUARDIAN AND WARD"; "TRUSTS"; "WILLS."

"A person interested," within the meaning of V. S. 2584 allowing an appeal from a decree of the probate court, is one who has some legal right, or is under some legal liability that may be enlarged or diminished by the decree. *In re Clark's Est.*, 62.

An administrator *de bonis non* directed by the probate court to make payment to a certain person *held* to be a person "interested" in a decree appointing an administrator of the latter, within V. S. 2584 relating to appeals from probate court. *Ibid.*

A court of chancery can neither restrict nor supplant the jurisdiction of the probate court, nor supervise its action, but can intervene only in aid of that court. *Clark v. Peck's Exrs.*, 275.

PROCESS.

See "ABATEMENT."

V. S. 1091, relative to service on absent defendant, *held* to apply to a non-resident as well as to a resident. *Wilkins' Admr. v. Brock*, 57.

QUANTUM MERUIT.

See "ASSUMPSIT, ACTION OF"; "DAMAGES" § 1; "CONTRACTS" § 5.

RAILROADS.

See "MASTER AND SERVANT" § 2.

§ 1. Control and Regulation in General.

Where the railroad commissioners served notice of an investigation of a crossing accident under V. S. 3987, but did not give notice of any investigation under V. S. 3989, as amended by No. 68, Acts 1902, an order directing the railroad to operate its trains with the engines headed in the direction the trains were moving *held* void. *In re Order of R. R. Commissioners*, 53.

Under V. S. 3890 and 3989 as amended by No. 68, Acts 1902, § 8, *held* that the Supreme Court had exclusive power to establish a railroad station; and that the power of the railroad commissioners was only in regard to buildings where a station had already been established. *In re Order of R. R. Commissioners*, 266.

The mere occasional stopping of trains at a point *held* not to create or establish a station there, so as to give the railroad commissioners power to order the erection of station houses. *Ibid*.

RAILROAD COMMISSIONERS.

See "RAILROADS."

RECEIVERS.

The rights of a receiver in property of an insolvent estate vest as of the date of the receiver's appointment, and are subject to valid liens against the same. *Baldwin v. Spear Bros.*, 43.

Joinder of a receiver in a suit to perfect a mechanic's lien on property in the receiver's hands would not authorize a sale of the property in such proceedings. The lienor should either sell the property under an order of the chancellor, or foreclose his lien under the statute, with the chancellor's consent.

On a sale of property in the hands of a receiver, subject to a mechanic's lien, the lienors were entitled to have their lien preserved as to the proceeds, and to priority of payment over general creditors. *Ibid.*

RECEIVING STOLEN GOODS.

An indictment under V. S. 4947 for receiving stolen goods *held* sufficient as to the essential elements,—knowledge that the goods were stolen and receiving them with an unlawful intent. *State v. Banister*, 524.

REFERENCE.

A reference under V. S. 1437 can be had only by agreement. *American Can Co. v. Grimm*, 494.

Where after reference, defendant filed an additional plea of setoff, under V. S. 1156, which raised new issues triable by jury, defendant was not entitled to have such issues go to the referee under the original reference, without plaintiff's consent. *Ibid.*

RELEASE.

See "TRIAL" § 6.

Facts *held* insufficient to show fraud in procuring release of plaintiff's interest in an estate. *Probate Court v. Enright*, 416.

REPLEVIN.

See "BANKRUPTCY" § 1.

RESIDENCE.

See "DOMICILE"; "PAUPERS."

SALES.

§ 1. Operation and Effect.

Evidence of the public demand for a certain equipment on automobiles *held* admissible on the question of value in an action for the price of a machine without such equipment. *Grout v. Moulton*, 122.

Statements in a sale of an automobile *held* to be representations. *Ibid.*

To make a seller responsible for false representations made by his agent in respect to the subject-matter of the sale, it is not necessary that they should have been simultaneous with the conclusion of the contract, but only that they should have been made during the negotiations that led to the contract, and have influenced the buyer in making it, and entered into it as a part thereof. *Ibid.*

SLANDER.

See "APPEAL AND ERROR" § 4; "TRIAL" § 3.

SPECIFIC PERFORMANCE.

See "HUSBAND AND WIFE" § 1.

STATUTES, CONSTRUCTION OF.

See "BREACH OF THE PEACE"; "CRIMINAL LAW" § 1; "CITIZENS"; "INTOXICATING LIQUORS"; "PRISONS"; "PROCESS."

General language in a statute should receive a general construction, unless restricted by the context or by plain inference from the scope and purpose of the act. *Wilkins' Admr. v. Brock*, 57.

Statutes *in pari materia* should be construed together; and when a statute uses words in a certain sense, and a subsequent statute uses them on the same subject, it will be taken to use them in the same sense, nothing to the contrary appearing. *Ibid.*

A statute which creates a new mode of enforcing an existing right does not abolish a pre-existing mode, without express words or necessary implication to that effect. *Bergman v. Gay*, 262.

A statute will not be construed as ousting or restricting the jurisdiction of a superior court and vesting it in an inferior tribunal, without express words or necessary implication to that effect. *In re order of R. R. Commissioners*, 266.

Court will not pass upon the constitutionality of a statute, unless it is necessary to do so in order finally to determine the case. *State v. Wilson*, 379.

When the meaning of a statute is doubtful, the consequences may be considered in its construction. *In Re Sammon*, 521.

STATUTES CONSTRUED.

- Acts 1894, No. 165. *East Montpelier v. Barre*, 542.
Acts 1896, No. 40. *Clark v. Peck*, 275.
Acts 1896, No. 49. *Kittredge v. Kittredge*, 337.
Acts 1896, No. 121. *Morrill's Admr. v. Order of Foresters*, 479.
Acts 1896, No. 94. *State v. Burns*, 272.
Acts 1901, No. 4. *Page et al v. McClure et al.* 83.
Acts 1902, No. 68. *In re Order of R. R. Commissioners*, 266.
Acts 1902, No. 4. *Page et al v. McClure et al.* 83.
Acts 1902, No. 90. *State v. Shappy*, 306.
Acts 1904, No. 60. *Boyce v. Bolston*, 40.
Acts 1904, No. 127. *State v. Burns*, 272.
Acts 1904, No. 115. *Page et al v. McClure et al.* 83.
Acts 1904, No. 115. *State v. Shappy*, 306.
Acts 1906, No. 200. *In re Sammon*, 521.
V. S. 130. *Page et al. v. McClure et al.* 83.
V. S. 936-942. *Davenport v. Crowell*, 419.
V. S. 939. *Allen's Admr. v. Allen's Admrs.*, 173.
V. S. 942. *Ibid.*
V. S. 1091. *Wilkins' Admr. v. Brock et al.* 57.
V. S. 1099. *Patch Mfg. Co. v. Capeless et al.* 1.
V. S. 1183. *Ibid.*
V. S. 1183. *Tarbell & Whitham v. Gifford*, 869.
V. S. 1304. *Patch Mfg. Co. v. Capeless, et al.* 1.
V. S. 1437. *American Can Co. v. Grimm*, 494.
V. S. 1665. *Clark v. Peck*, 275.
V. S. 2179. *Cushman v. Davis*, 111.
V. S. 2189. *Ibid.*
V. S. 2279. *Bergman v. Gay*, 262.
V. S. 2281. *Ibid.*
V. S. 2299. *Ibid.*
V. S. 2325. *Harris et al v. Harris et al.* 22.
V. S. 2380. *Clark v. Peck*, 275.
V. S. 2384. *Ibid.*
V. S. 2440. *Hogan & Hogan v. Sullivan*, 36.
V. S. 2698. *Whittier v. McFarland*, 365.
V. S. 2810. *Scoville v. Brock*, 449.
V. S. 2972. *Jenney v. Alden et al.* 156.
V. S. 2983. *Page et al. v. McClure et al.* 83.
V. S. 2984. *Ibid.*

- V. S. 2985. *Ibid.*
V. S. 2996. *Ibid.*
V. S. 3490. *Howrigan v. Bakersfield*, 249.
V. S. 3890. *In re Order of Railroad Commissioners*, 266.
V. S. 3987. *In re Order of Railroad Commissioners*, 53.
V. S. 3989. *Ibid.*
V. S. 3989. *In re Order of Railroad Commissioners*, 266.
V. S. 4921. *State v. Louanis*, 463.
V. S. 4947. *State v. Banister*, 524.
V. S. 5059. *State v. Ackerly*, 69.
V. S. 5206. *In re Sammon*, 521.
V. S. 5274. *In re McKenna*, 34.

TAXATION.

See "MORTGAGES" § 1.

TENDER.

See "MORTGAGES" § 2.

TIMBER.

See "JUDGMENT"; "DEEDS" § 2.

TOWNS.

See "DOMICILE"; "HIGHWAYS AND BRIDGES"; "MANDAMUS"; "MUNICIPAL CORPORATIONS"; "STATUTES, CONSTRUCTION OF."

V. S. 130, as amended by No. 4, Acts 1902, providing for canvassing votes under the Australian ballot system by boards of civil authority, held inapplicable to annual or special elections in towns having fewer than 4,000 inhabitants. *Page v. McClure*, 83.

Under V. S. 2983, 2984, 2985, 2996, the board of civil authority of a town having fewer than 4,000 inhabitants held not bound to canvass, count, and declare votes taken on the question of license at a town meeting at which such question was voted on, under No. 115, § 2, Acts 1904. *Ibid.*

The provision of V. S. 2972, 2980, that a town meeting shall be annually held at which certain enumerated officers shall be chosen, is a positive legislative command. *Jenney v. Alden*, 156.

Where an annual town meeting adjourns without day, without electing any of the officers or doing any of the business specified in the warning, mandamus will issue compelling the selectmen forthwith to call a special town meeting for the election of officers. *Ibid.*

TRIAL.

See "APPEAL AND ERROR" § 4; "CONTRACTS" § 2; "CRIMINAL LAW" § 4; "DAMAGES" § 1.

§ 1. Course and Conduct of Trial in General.

Plaintiff *held* not to have waived an objection to the competency of defendant's wife as a witness. *Boyce v. Bolston*, 40.

In an action for injuries to an electric lineman, where the court refused certain requested instructions on the fellow-servant doctrine, an exception to the charge as given in respect of such requests *held* sufficient. *Sias v. Consolidated Lighting Co.*, 224.

The court may, in its discretion, properly refuse to allow a cross-examiner to go into details in showing the hostility of a witness. *State v. Baird*, 257.

A case is to be tried and determined upon the issue joined by the parties, and evidence is to be received and applied as it bears upon that issue. *Probate Court v. Enright*, 416.

Where neither party desires to go to the jury upon an issue of fact made by conflicting evidence in the course of a trial by jury, that issue is thereby submitted to the court, and its holding thereon is conclusive. *Cleveland v. Town of Washington*, 498.

§ 2. Reception of Evidence.

In an action for rent under a lost lease, plaintiff *held* entitled to show in rebuttal that in certain conversations had between the witness and defendant, the latter made no claim that he had an insufficient supply of fire wood, as showing that such claim was manufactured for the purpose of the trial. *Green v. Dodge*, 73.

An offer to show plaintiff's pecuniary condition at the time of the assault complained of without a statement as to what it was expected to prove such condition was, *held* too general. *McQuigan v. Ladd*, 90.

§ 3. Arguments and Conduct of Counsel.

Argument of counsel in slander asking the jury to draw conclusions unfavorable to plaintiff for his failure to call a witness equally accessible to either party, *held* reversible error. *Sears v. Duling*, 334.

Improper remarks of counsel in argument to the jury having been fully retracted, and the matter having been adequately dealt with by the court, there was no cause for setting the verdict aside. *McKenzie v. Boutwell & Boutwell*, 383.

In civil cases considerable latitude is allowed counsel in commenting upon the parties from the evidence. It is when the evidence is transgressed that the line is sharply drawn. *Foss v. Smith*, 434.

The argument of counsel in commenting upon the opposing party *held* not reversible error. *Ibid*.

§ 4. Taking Case or Question from Jury.

Where there is substantial evidence supporting plaintiff's claim, the court cannot direct a verdict for defendant. *Schofield's Admr. v. Ins. Co.* 161.

§ 5. Instructions to Jury.

In an action on an account, failure of the court to charge as to the effect of an item of setoff as saving plaintiff's account from the Statute of Limitation *held* error. *Boyce v. Bolston*, 40.

That the court overlooked some evidence or was mistaken in stating the same in an instruction *held* not error where the jury were charged that the whole matter was for them to determine. *Green v. Dodge*, 73.

An exception to the refusal to give certain requests, etc. *held* too general. *White v. Lumiere North American Co.*, 206.

§ 6. Trial by Court.

Finding *held* not to fully negative consideration for release of plaintiff's interest in an estate. *Probate Court v. Enright*, 416.

Finding that there was no consideration for release pleaded by defendant *held* outside the pleadings. *Ibid*.

TRUSTEE PROCESS.

See "ASSOCIATIONS."

TRUSTS.

See "EQUITY" § 1.

§ 1. Creation, Existence and Validity.

Possession of an estate by a widower acting under the executors *held* not to render him a trustee *de son tort*, requiring him to account in equity. *Clarke v. Peck's Exrs.* 275.

UNDUE INFLUENCE.

See "CONTRACTS" § 1; "INJUNCTIONS" § 2.

UNINCORPORATED ASSOCIATIONS.

See "ASSOCIATIONS"; "CONSTITUTIONAL LAW" § 1.

WATER AND WATER COURSES.

See "EVIDENCE" § 3.

§ 1. Appropriation and Prescription.

The burden of establishing a prescriptive right is on him who asserts it. *Dutton v. Stoughton*, 361.

No prescription begins to run until a right of action accrues; and no right of action accrues until injury is inflicted. *Ibid.*

Prescription *held* to have commenced to run in favor of a right to flow lands by means of a dam only when the dam began to be so maintained that actual injury to the lands resulted from the back water. *Ibid.*

WILLS.**§ 1. Construction.**

Some discretion is still left in the court of chancery as to whether it will take jurisdiction under No. 40, Acts 1896, providing for actions to construe wills. *Harris v. Harris*, 22.

Before a court of chancery will take jurisdiction under No. 40, Acts 1896, it must decide whether the terms of the will are in dis-

pute within the meaning of the act, and also whether the doubt is such as to require the intervention of a court of chancery. *Ibid.*

Under No. 40, Acts 1896, the court of chancery, in advance of a decree of distribution by the probate court, *held* without ancillary or original jurisdiction of a bill by legatees to construe the will. *Ibid.* *Clark v. Peck's Exrs.* 275.

No. 40, Acts 1896 *held* not to authorize chancery to take jurisdiction of a dispute as to a will, not shown to be between the parties interested therein. *Clark v. Peck's Exrs.* 275.

Under V. S. 1665, a court of chancery *held* to have no right to review the probate court's denial of a right to appeal, though had its decision been different, a dispute might have arisen as to the construction of a will which would have authorized a bill in chancery, under No. 40, Acts 1896. *Ibid.*

WITNESSES.

See "ABATEMENT"; "TRIAL" § 1.

§ 1. Competency.

Prior to the passage of No. 60, Acts 1904, a wife who acted as her husband's bookkeeper *held* not entitled to testify in his behalf concerning certain items of account kept by her. *Boyce v. Bolston*, 40.

The reopening of the question of the competency of a witness *held* to be in the discretion of the trial court. *State v. Louanis*, 463.

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